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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Diplock, *In re*	[1941] Ch. 253; 57 T.L.R. 263; [1941] 1 All E.R. 93; [1944] A.C. 341; [1944] 2 All E.R. 60	*R.*	250
Doe *v.* Bridges	1 B. & Ad. 847	*R.*	286
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Drummond, *In re*	[1914] 2 Ch. 90; 30 T.L.R. 429	*C.*	233, 247, 248
Duffy, *In re*	[1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756	*Appl.*	613, 623–631
Duffy, *In re*	[1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756	*Appl.*	135, 142–144
Duke *v.* Clarke	[1894] W.N. 100	*R.*	131
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Dunmore *v.* Wharam	67 L.J.Ch. 221	*R.*	131
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Edwards, *In re*	[1910] 1 Ch. 541; 26 T.L.R. 308		470
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Flinn, *In re*	[1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541	*Dist.*	233, 245
Follick (J. & M.) Ltd., *In re*	97 L.T. 645; 52 S.J. 13		401
Forbes' Executors *v.* Inland Revenue Commissioners	1958 S.C. 177; 38 T.C. 12	*F.*	27, 41–43, 45, 47–51
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Friederberg, The	10 P.D. 112	*R.*	229
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Garrard, *In re*	[1907] 1 Ch. 382; 23 T.L.R. 256	*Dist.*	233, 245
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Great Western Railway Co. *v.* Bater	[1922] 2 A.C. 1; [1920] 3 K.B. 266; 38 T.L.R. 448; 8 T.C. 231	*R.*	163, 164
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Greening, *In re*, Marsh's Case	L.R. 13 Eq. 388	*C.*	378, 388–390, 392, 394
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Household *v.* Grimshaw	[1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366	*Dist.*	147, 166
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Rumball, *In re*	[1956] Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71	*Dist.*	233, 242, 245
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Russian Bank for Foreign Trade, *In re*	[1933] Ch. 745; 49 T.L.R. 253	*R.*	88
Russian Commercial and Industrial Bank, *In re*	[1955] Ch. 148; [1955] 2 W.L.R. 62; [1955] 1 All E.R. 75	*R.*	110

Rye and Eyre *v.* Inland Revenue Commissioners	19 T.C. 164; 51 T.L.R. 318	*R.*	432
Sackville *v.* Smyth	L.R. 17 Eq. 153		185
St. Aubyn *v.* Attorney-General	[1952] A.C. 15; [1951] 2 All E.R. 473		574
St. Aubyn *v.* Attorney-General	[1952] A.C. 15; [1951] 2 All E.R. 473	*R.*	526
Samuels, *In re*, *Ex p.* The Trustee *v.* J. H. S. Tee, Trading as Tee Bros. & Co.	[1935] Ch. 341; 51 T.L.R. 169	*R.*	176
Samuelson *v.* Producers' Distributing Co. Ltd.	[1932] 1 Ch. 201; 48 R.P.C. 580	*Appl.*	264, 276
Sanford *v.* Gibbons	3 Hare 195n.		20
Saunders *v.* Vautier	4 Beav. 115; Cr. & Ph. 240		351
Sebright, *In re*	[1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547	*Appl.*	289, 307, 308
Sharman (R. W.) Ltd., *In re*	[1957] 1 W.L.R. 774; [1957] 1 All E.R. 737		228
Sharpley *v.* Manby	[1942] 1 K.B. 217; 58 T.L.R. 91; [1942] 1 All E.R. 66	*Appl.*	398, 403, 404, 406
Shaw, decd., *In re*	[1957] 1 W.L.R. 729; [1957] 1 All E.R. 745		234
Short *v.* J. & W. Henderson Ltd.	39 B.W.C.C. 62		160
Sifton *v.* Sifton	[1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435	*R.*	466
Simmons *v.* Heath Laundry Co.	[1910] 1 K.B. 543; 26 T.L.R. 326		159
Simon *v.* Barber	3 Hare 195n.		20
Simson, *In re*	[1950] Ch. 38; 65 T.L.R. 721; [1949] 2 All E.R. 826	*C.*	458, 473
Sloane *v.* British Steamship Co. Ltd.	[1897] 1 Q.B. 185; 13 T.L.R. 124		253
Smith, *In re*	[1928] Ch. 915		411
Smith, *In re*	33 Ch.D. 195	*C.*	181, 186
Smith and Snipes Hall Farm Ltd. *v.* River Douglas Catchment Board	[1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179	*C.*	2, 6
Smith-Bosanquet, *In re*	[1940] Ch. 954; 56 T.L.R. 960; [1940] 3 All E.R. 519	*Appl.*	289, 300, 301, 303, 305–308, 310, 311
Smyth, *In re*	[1898] 1 Ch. 89; 14 T.L.R. 77	*R.*	336
Soar *v.* Ashwell	[1893] 2 Q.B. 390		638
Solomons *v.* R. Gertzenstein Ltd.	[1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625		271
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Spencer, *In re*	[1935] Ch. 533	*R.*	453
Spensley's Will Trusts, *In re*	[1954] Ch. 233; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178		236
Square *v.* Model Farm Dairies (Bournemouth) Ltd.	[1939] 2 K.B. 365; 55 T.L.R. 384; [1939] 1 All E.R. 259		269
Steed's Will Trusts, *In re*	[1959] Ch. 354; [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609	*Aff.*	408, 418
Stevens *v.* Chown	[1901] 1 Ch. 894; 17 T.L.R. 313		271
Stokes *v.* Bennett	[1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313	*Appl.*	424, 432, 433, 436
Strick *v.* Longsdon	34 T.C. 528	*C.*	477, 486
Sudeley *v.* Attorney-General	[1897] A.C. 11	*R.*	336
Sudeley *v.* Attorney-General	[1897] A.C. 11; 13 T.L.R. 38	*C.*	181, 189
Sutherland, decd., *In re*	[1960] Ch. 134; [1959] 3 W.L.R. 543; [1959] 2 All E.R. 682	*Aff.*	613
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Tennant *v.* London County Council	121 J.P. 428		558
Tennant *v.* London County Council	55 L.G.R. 421	*Appl.*	398, 405, 406
Tennant *v.* Lord Advocate	[1939] A.C. 207; 55 T.L.R. 472; [1939] 1 All E.R. 672		542
Tennant *v.* Smith	[1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158		513
Tennant *v.* Smith	[1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158		158
Tennant *v.* Smith	[1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158	*R.*	34, 42
Tennant *v.* Smith	3 T.C. 158	*Appl.*	437, 443
Theophile *v.* Solicitor-General	[1950] A.C. 186; 66 T.L.R. (Pt. 1) 441; [1950] 1 All E.R. 405		601
Thompson, *In re*	[1934] Ch. 342		239
Thompson's Settlement Trusts, *In re*	[1905] 1 Ch. 229; 21 T.L.R. 86	*R.*	649
Thorley *v.* Byrne	3 Hare 195n.		20
Thwaites & Co. *v.* M'Evilly	[1904] 1 I.R. 310; 21 R.P.C. 397	*R.*	287
Tollemache Settled Estates (Trustees of) *v.* Coughtrie	[1959] 1 W.L.R. 900; [1959] 2 All E.R. 582	*Rev.*	477
Tombs *v.* Roch	2 Coll. 490	*C.*	181, 189
Tuck, *In re*	[1906] 1 Ch. 692; 22 T.L.R. 425		558
Tufnell *v.* Constable	7 Ad. & E. 798	*R.*	649

Turner's Will Trusts, *In re*	[1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435	*Appl.*	445, 453
United Railways of the Havana and Regla Warehouses Ltd., *In re*	[1958] Ch. 724; [1958] 2 W.L.R. 229; [1957] 3 All E.R. 641	*Aff.*	54
Varley, *In re*	68 L.T. 665	*Appl.*	458, 469, 472, 475
Vita Food Products, Inc. *v.* Unus Shipping Co. Ltd. (in Liquidation)	[1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513	*R.*	97
Wallace *v.* Attorney-General	L.R. 1 Ch. 1	*R.*	332, 335
Ward *v.* Inland Revenue Commissioners	[1956] A.C. 391; [1956] 2 W.L.R. 578; [1956] 1 All E.R. 571	*R.*	551
Warren, *Ex p.*, *In re* Holland	15 Q.B.D. 48	*R.*	178
Webb *v.* Whiffin	L.R. 5 H.L. 711	*R.*	385, 386
Wedd *v.* Porter	[1916] 2 K.B. 91	*R.*	101
Weight *v.* Salmon	51 T.L.R. 333; 19 T.C. 174	*R.*	39, 51
Weight *v.* Salmon	19 T.C. 174	*Appl.*	437, 443
Weller *v.* Baker	2 Wils.K.B. 414	*R.*	276
Welton *v.* Saffery	[1897] A.C. 299; 13 T.L.R. 340	*R.*	5, 7
Wenlock (Baroness) *v.* River Dee Co.	36 Ch.D. 675n.; 10 App.Cas. 354		352
Westminster Bank Ltd. *v.* Attorney-General	[1939] Ch. 610; [1939] 2 All E.R. 72	*C.*	536, 546
Westminster Bank Ltd. *v.* Inland Revenue Commissioners	[1958] A.C. 210; [1957] 2 All E.R. 745	*Dist.*	536, 545
Wharton *v.* Masterman	[1895] A.C. 186	*Dist.*	346, 359–361, 367
White, *In re*	[1893] 2 Ch. 41		20
White, *In re*	[1901] 1 Ch. 570		450
White, *In re*	[1939] Ch. 131; [1938] 2 All E.R. 691	*R.*	331, 336
Whitney *v.* Inland Revenue Commissioners	[1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88	*R.*	623 600
Whitney *v.* Inland Revenue Commissioners	[1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88	*R.*	144
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Williams *v.* Harding	L.R. 1 H.L. 9		391
Williams' Trustees *v.* Inland Revenue Commissioners	[1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513; 27 T.C. 409	*C.*	233, 249
Wolstanton Ltd.'s Application, *In re*	[1952] Ch. 519; [1952] 1 All E.R. 678n.	*N.F.*	194, 216, 225, 229
Wolstanton Ltd. and Attorney-General of Duchy of Lancaster *v.* Newcastle-under-Lyme Corporation	[1940] A.C. 860; 56 T.L.R. 794; [1940] 3 All E.R. 101	*R.*	215
Wood, *In re*	[1949] Ch. 498; [1949] 1 All E.R. 1100		238

Wood's Trusts, *In re* . . .	[1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740	*R.* . . .	466, 468
Wrightson *v.* Inland Revenue Commissioners	[1958] A.C. 210; [1957] 2 All E.R. 745	*Dist.* . .	536, 545
Yenidje Tobacco Co., *In re* . .	[1916] 2 Ch. 426; 32 T.L.R. 709	*R.*	9
Young Sid, The	[1929] P. 190; 45 T.L.R. 389	*R.*	229

STATUTES JUDICIALLY CONSIDERED

1836

School Sites Act, 1836 (6 *&* 7 *Will.* 4, *c.* 70), *ss.* 1, 2, 3 - - - **Russell J. 631**

1841

School Sites Act, 1841 (4 *&* 5 *Vict. c.* 38), *ss.* 1, 2 - - - **Russell J. 631**

1850

Court of Chancery of Lancaster Act, 1850 (13 *&* 14 *Vict. c.* 43), *s.* 15 **Roxburgh J. 128**

1869

Endowed Schools Act, 1869 (32 *&* 33 *Vict. c.* 56), *ss.* 9, 46 - - **Russell J. 631**

1887

Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *ss.* 2, 3, 19 **Danckwerts J. 262**

1894

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (*d*), 3 (1) (2) **Cross J. 534**

—— —— *s.* 7 (5) - - - - **C.A. 611**

—— —— *s.* 14 (1) - - - - **C.A. 288**

1899

Small Dwellings Acquisition Act, 1899 (62 *&* 63 *Vict. c.* 44), *s.* 6 (2) **Danckwerts J. 491**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schs. D, E* - - **Upjohn J. 145**
C.A. 498

1922

Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18 - - - **Upjohn J. 145**
C.A. 498

—— —— *s.* 21 (6) - - **Pennycuick J. 563**

1923

Mines (Working Facilities and Support) Acts, 1923 *and* 1925 (13 *&* 14 *Geo.* 5, *c.* 20, *and* 15 *&* 16 *Geo.* 5, *c.* 91), *ss.* 6 (1) (2) (5), 9 (1) (2) - **Upjohn J. 192**

1925

Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2) - - **Danckwerts J. 444**

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 149 (3) - **Buckley J. 582**

1925

Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 35 (1) **Danckwerts J. 179**

1927

Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 23 (1), 25 (1) **Wynn-Parry J. 396**

1933

Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 268 - - - **C.A. 232**

1936

Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 19 (1) (*a*) **Pennycuick J. 563**

1937

Physical Training and Recreation Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 46), *s.* 4 **C.A. 232**

Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14 (1) - **Pennycuick J. 563**

1940

Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 50 (1), 55 (1) (2) - **Danckwerts J. 134**
C.A. 611

1946

Finance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch. II, Pt. I* - **Danckwerts J. 134**
C.A. 611

1948

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 20 (1) - - - **Vaisey J. 1**

—— —— *ss.* 212, 214 - - - **C.A. 378**

—— —— *ss.* 325 (1), 326 (1) (2) **Wynn-Parry J. 170**

1949

Finance Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2) - - - - **C.A. 313**

1952

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 82, *Sch. A*, *paras.* 1, 2, 175 (1) (*a*) - - **C.A. 475**

—— —— *ss.* 122, 156 - - **Upjohn J. 145**

—— —— *ss.* 122, 137 (*a*), 156 - **C.A. 498**

—— —— *ss.* 148, 170 (1) (2), 177 (1) (2) **Danckwerts J. 423**

1952

—— —— *ss.* 245, 256 - **Pennycuick J. 563**

—— —— *ss.* 292 (1), 297 - **Danckwerts J. 134**
C.A. 611

—— —— *s.* 349 (1) (2) (3) (4), *Sch.* 18
C.A. 592

—— —— *Sch.* 9, *r.* 1 - **Danckwerts J. 437**
C.A. 27

—— —— *s.* 405 (1) (2) - **Danckwerts J. 444**

1953

Merchandise Marks Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 48), *ss.* 1, 4 - **Danckwerts J. 262**

1954

Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (3), 32 (1)
Roxburgh J. 10

—— —— *ss.* 25 (1), 66 - **Wynn-Parry J. 396**

1954

—— —— *s.* 64 (1) - - - **Cross J. 553**

1955

Finance (No. 2) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 17), *s.* 4 (1) (2) - - **C.A. 592**

1957

Coal-Mining (Subsidence) Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 59), *s.* 6 - **Upjohn J. 192**

Solicitors Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 69 (2), *proviso* (*i*), 72
Roxburgh J. 256

1958

Recreational Charities Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 17), *s.* 1 - - - **C.A. 232**

Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1 - **Danckwerts J. 122**
C.A. 407

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Company Winding Up Rules, 1949 (*S.I.* 1949, *No.* 330), *r.* 88 - - - **C.A. 378**

R.S.C., *Ord.* 52, *r.* 3 - **Roxburgh J. 128**

R.S.C., *Ord.* 53D, *rr.* 5 (1) (2) (3), 6
Cross J. 553

R.S.C., *Ord.* 54, *r.* 4E - - **Cross J. 553**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

RAYFIELD *v.* HANDS AND OTHERS.

[1957 R. No. 603.]

1958
Mar. 25, 26;
April 2.

Vaisey J.

Company—Shares—Articles of association—Enforcement between members—Provision that every member intending to transfer shares should inform directors who "will take the said shares equally "between them," and who "will pay a fair value therefor"—Meaning of "will"—Whether directors liable to take up member's shares—Construction—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 20 (1).

Contract—Parties—Enforcement by third party—Company's articles of association—Enforcement between members inter se.

Contract—Construction—Ut res magis valeat quam pereat—Company's articles of association.

The plaintiff was a shareholder in a company, article 11 of the articles of association of which required him to inform the directors of his intention to transfer shares in the company, and which provided that the directors "will take the said shares equally between "them at a fair value." In accordance with article 11 the plaintiff so notified the directors, who contended that they need not take and pay for the plaintiff's shares, on the ground that the articles imposed no such liability upon them. On the plaintiff's claim for the determination of the fair value of his shares, and for an order that the directors should purchase such shares at a fair value:—

Held, (1) that upon their true construction the articles required the directors to purchase the plaintiff's shares at a fair price.

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

(2) That article 11 was concerned with the relationship between the plaintiff as a member and the defendants, not as directors, but as members of the company.

(3) That it was not necessary, for the plaintiff to succeed in his action, that he should join the company as a party in addition to the directors.

Judgments of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179; *Drive Yourself Hire Co. Ltd.* v. *Strutt* [1954] 1 Q.B. 250; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475; and *Dean* v. *Prince* [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749 considered.

ACTION.

Field-Davis Ltd. (hereinafter called " the company ") was a private company carrying on business as builders and contractors, incorporated in 1941 under the Companies Act, 1929, as a company limited by shares, having a share capital of £4,000, divided into 4,000 ordinary shares of £1 each, of which 2,900 fully-paid shares had been issued. The plaintiff, Frank Leslie Rayfield, was the registered holder of 725 of those shares, and the defendants, Gordon Wyndham Hands, Alfred William Scales and Donald Davies were at all material times the sole directors of the company. In so far as is material the articles of association of the company provided by article 6: " No shares in the company " shall be transferred to a person not a member of the company so " long as any member of the company may be willing to purchase " such shares at a fair value." Article 9 provided: " The " directors may at any time in their absolute discretion refuse " to register any transfer of shares." Under the general heading of " Directors " were the following articles: " 10. The number of " directors of the company shall not be more than four. The " following persons shall be the first directors of the company. . . . " 11. Every member who intends to transfer shares shall inform " the directors who will take the said shares equally between " them at a fair value but subject to the above no person shall " hold more than 1,000 shares in the capital of the company. " 12. In the event of death of any director his shares are to be " taken up equally between the remaining directors who will pay " a fair value therefor together with all moneys due to the " deceased up to the time of his death."

On April 4, 1955, the plaintiff by a notice in writing informed the defendants, as directors of the company, of his intention to transfer his 725 shares to them as provided by article 11. The defendants denied any liability to take up and pay for the shares, and the plaintiff, by his statement of claim asked (1) that the fair value of the plaintiff's said shares might be determined by the court, (2) that the defendants be ordered to purchase such shares at their fair value in such proportions as they might agree upon, or in default of agreement, then equally, and (3) that an inquiry be ordered if necessary to ascertain such fair value.

R. B. S. Instone for the plaintiff.
Michael Albery Q.C. and *Paul Baker* for the defendants.

In addition to the cases cited in the judgment, the following cases were referred to in the course of argument: *London Sack and Bag Co. Ltd.* v. *Dixon & Lugton Ltd.*[1]; *In re Greene, decd.*[2]

Cur. adv. vult.

April 2. VAISEY J., reading his judgment, stated the facts and continued: It is article 11 with which I am mainly concerned in the present case, in the following circumstances. On or about April 4, 1955, the plaintiff, by a notice in writing bearing that date, informed the defendants as the directors of the company of his intention to transfer his shares to them as provided by article 11. The defendants were and are, however, unwilling and contend that they are not liable to take and pay for the plaintiff's shares. They say that article 11 imposes no enforceable liability upon them, and they base their contention first on the wording of article 11 itself, arguing that on its true construction it does not purport to impose any liability on the company's directors. It is admitted that the words "every member . . . shall inform" the directors does create an obligation but it is argued by the defendants that the words "the directors . . . will take the "shares" imports in some way the idea of an option or choice or volition on the part of the directors having regard to the inherent difference (not always observed) in the English language between the words "shall" and "will."

I appreciate the force of that argument, but I cannot accept it. In this context, while the word "shall" clearly imports compulsion and obligation, the word "will" indicates as it seems to me a resultant prospective eventuality, in which the member has to sell his shares and the directors have to buy them, each being under an obligation to bring that eventuality into effect. I think there is thus in the language of article 11 a mutual obligation. It has been said that articles of association ought not to be construed too meticulously. See *per* Wynn-Parry J. in *In re Hartley Baird Ltd.*,[1] where he said: "In the interpretation of "such a commercial document as articles of association, the "maxim ut res magis valeat quam pereat should certainly be "applied, and I propose to interpret these articles in the light of "that maxim." I am not aware that this maxim has ever been put into English, but I suggest that it directs us to "validate if "possible." And see also *per* Jenkins L.J. in *Holmes* v. *Keyes*,[2] where he is reported as saying that in his view the "articles of "association of the company should be regarded as a business "document and should be construed so as to give them reasonable "business efficacy . . . in preference to a result which would "or might prove unworkable."

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[1] [1943] 2 All E.R. 763.

[2] [1949] Ch. 333; [1949] 1 All E.R. 167.

I hold that the defendants' case so far as it depends on the construction of the company's articles of association fails, but I have not overlooked the arguments based on the undoubted difficulty of giving effect to article 11 in other circumstances, for example, where the member desiring to transfer his shares is himself a director, or where several intimations of intention to sell are given simultaneously. But, in my judgment, the article ought not to be invalidated for the purposes of a case (such as this) where it is perfectly easy to give effect to it.

Another point was taken which I hold to be equally insubstantial, namely, that the plaintiff has not in terms pleaded his ability and willingness to carry out his part of the bargain. That is a rule of pleading which applies principally, if not exclusively, to actions between vendors and purchasers of real estate. See Halsbury, 2nd ed., vol. 31, p. 421. I should, in the circumstances, have allowed the statement of claim to be amended to comply with the rule, if it had seemed to me to be necessary, which I do not think it is.

The next and most difficult point taken by the defendants, as to which it would appear that there is no very clear judicial authority, is that article 11, as part of the company's articles of association, does not do what it looks like doing, that is, to create a contractual relationship between the plaintiff as shareholder and vendor and the defendants as directors and purchasers. This depends on section 20 (1) of the Companies Act, 1948, which reads as follows: "Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles." This re-enacted corresponding provisions in the earlier Companies Acts, but it seems that such provisions are for the purposes of the present case substantially identical with the subsection which I have just read. In the circumstances, I was referred to what the textbooks have to say on the subject, and I think I ought to summarise their statements.

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[1] [1955] Ch. 143, 146; [1954] 3 W.L.R. 964; [1954] 3 All E.R. 695.

[2] [1959] Ch. 199, 215; [1958] 2 W.L.R. 772, 783; [1958] 2 All E.R. 129.

In the 12th edition of Buckley on the Companies Acts at p. 52 allusion is made to the "large number of apparently conflicting judicial decisions and dicta as to the exact nature of the contractual relations established by the memorandum and articles both as between the company and the members and as between the members inter se," and it is further expressly pointed out that there are decisions or dicta both to the effect that the articles do, and also to the effect that they do not, constitute a contract between the members inter se.

The variety of the judicial views on the matter is not I think overstated here. Gore-Browne's Handbook on Joint Stock Companies, 41st ed., at p. 45, states the effect of section 20 in these words: "[It] is to create an obligation binding alike on the members in their dealings with the company, on the company in its dealings with the members as members, and on the members in their dealings with one another as members . . . and even a member cannot enforce provisions for his benefit in some other capacity than that of member: for example he cannot assert a right to be appointed solicitor, secretary, or director by reason of provisions contained only in the articles."

In Palmer's Company Precedents, 16th ed., Part I, at p. 458, the matter is discussed on general lines, and the effect of some of the cases is summarised, and the following quotation is cited from the speech of Lord Herschell in *Welton* v. *Saffery*[3]: "It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se." I find that statement somewhat cryptic.

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[3] [1897] A.C. 299, 315; 13 T.L.R. 340.

In Halsbury's Laws of England, 3rd ed., vol. 6, at p. 129, under the sub-heading of "Memorandum and Articles," there is a paragraph in these words: "While the articles regulate the "rights of the members, inter se, they do not, it would seem, "constitute a contract between the members, inter se, but only a "contract between the company and its members, and, therefore, "the rights and liabilities of members as members under the "articles can only be enforced by or against the members through "the company." I will consider this proposition later on.

Now the question arises at the outset whether the terms of article 11 relate to the rights of members inter se (that being the expression found in so many of the cases), or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that, in my judgment, the relationship here is between the plaintiff as a member and the defendants not as directors but as members.

In *In re Leicester Club and County Racecourse Co.*,[4] Pearson J., referring to the directors of a company said that they "continue members of the company, and I prefer to call them "working members of the company," and on the same page he also said: "directors cannot divest themselves of their character of "members of the company. From first to last, . . . they are doing "their work in the capacity of members, and working members of "the company. . . ." I am of opinion, therefore, that this is in words a contract or quasi-contract between members, and not between members and directors.

I have now to deal with the point for which there is considerable support in the cases, that the notional signing and sealing of the articles creates a contractual relation between the company on the one hand and the corporators (members) on the other, so that no relief can be obtained in the absence of the company as a party to the suit. The defendants' case in so far as it is based on this point seems to be met by two recent decisions of the Court of Appeal. I refer first to *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*,[5] and to the judgment of Denning L.J. in that case, which was a case of a covenant made, not by or with but for the benefit of the plaintiffs, and thereby enabling them to sue without the intervention of the covenantee. Section 56 of the Law of Property Act, 1925, was referred to in terms which it is not necessary for me to repeat

[4] (1885) 30 Ch.D. 629, 633; 1 T.L.R. 658.

[5] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179.

here. This same principle is further exemplified by the case of *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*,[6] see especially the judgment of Denning L.J. as there reported.

The case of the plaintiff may also be said to rest upon the well-known decision of *Carlill* v. *Carbolic Smoke Ball Co.*,[7] to which I need not refer except to say that it seems to me to be relevant here. To the like effect is *Clarke* v. *Earl of Dunraven*,[8] upon which the plaintiff here also relied.

In general discussions on the effect of section 20 to be found in the cases, I have, of course, considered the dissentient speech of Lord Herschell in *Welton* v. *Saffery*,[9] and the comprehensive review of the earlier authorities by Astbury J. in *Hickman* v. *Kent and Romney Marsh Sheepbreeders' Association.*[10] Among the numerous dicta in the judgment in that case, one which seems to me to be helpful and convincing is the one which reads as follows [11]: "the articles of association are simply a contract as "between the shareholders inter se in respect of their rights as "shareholders. They are the deed of partnership by which the "shareholders agree inter se."

Strangely enough the case which comes perhaps nearest to the present is one in which the point under section 20 of the Act was not taken, and either disregarded or ignored, but I cannot say that it was overlooked, as the decision was a decision of the Court of Appeal. I will read the headnote from the report of the case, the name of which is *Dean* v. *Prince* [12]: "The articles of association of a private company carrying on a light engineering "business provided that a deceased director's shares should be "purchased by the surviving directors at a price to be certified "by an auditor as a fair value. A director who held a controlling "interest in the company died. The auditor, having made a "certified valuation, stated in writing that for the purpose of his "valuation he had not regarded the company as a going concern "but that he had valued on a 'break-up' basis, because in his "opinion the shares had no value on any other basis, having "regard to the losses made by the company. On appeal from "Harman J., who held that the valuation was invalid and not "binding because the auditor had proceeded on the wrong basis "and had not attributed any special value to the shares in

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[6] [1954] 1 Q.B. 250; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.

[7] [1893] 1 Q.B. 256; 9 T.L.R. 124.

[8] [1897] A.C. 59; 13 T.L.R. 58.

[9] [1897] A.C. 299, 315; 13 T.L.R. 340.

[10] [1915] 1 Ch. 881.

[11] Ibid. 891.

[12] [1954] Ch. 409; [1954] 2 W.L.R. 538; [1954] 1 All E.R. 749.

"question although they carried control of the company:—"*Held* (1) that the auditor was right in not attributing a special "value to these shares on account of their carrying control. The "shares of the company should be valued as a whole and the "total then divided rateably amongst all the shares equally; "(2) that the auditor had correctly rejected the 'going concern' "basis of valuation, as the company had no expectation of profit-"making."

The decision of Harman J. was reversed on the question of valuation, and in the course of his reserved judgment, Wynn-Parry J., sitting as a member of the court, said this[13]: "... the "auditor, in my view, has to have regard to the realities of the "situation, he must take into account that the other directors, "and not merely one of them, are bound to purchase the shares "in question."

To show how close is the similarity between that case and the present, I will read from the report of the case before Harman J.[14] the article which was in question there: "In the event of the "death of any member his shares shall be purchased and taken "by the directors at such price as is certified in writing by the "auditor to be in his opinion the fair value thereof at the date of "death, and in so certifying the auditor shall be considered to "act as an expert and not as an auditor and accordingly the "Arbitration Act, 1889, shall not apply. Unless otherwise agreed "the directors shall take such shares equally between them."

I will refer, but only in passing, to another case closely bearing on the point now under consideration of *Borland's Trustee* v. *Steel Bros. & Co. Ltd.*[15] There, there was a provision in a company's articles of association compelling a shareholder at any time during the continuance of the company to transfer his shares to particular persons at a particular price. It was held that these provisions were not void as being repugnant to absolute ownership nor as tending to perpetuity, and it was also held that there was nothing in such a provision to defeat the rights of a trustee in bankruptcy. The case was decided by Sir George Farwell J., who made a number of remarks which bear on this question. I do not propose to refer to them in detail except one remark, where he says[16]: "these articles are nothing more or "less than a personal contract between Mr. Borland"—that was the director who went bankrupt—"and the other shareholders in

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[13] [1954] Ch. 409, 431.

[14] [1953] Ch. 590; [1953] 3 W.L.R. 271; [1953] 2 All E.R. 636.

[15] [1901] 1 Ch. 279; 17 T.L.R. 45.

[16] [1901] 1 Ch. 279, 290.

"the company under the 16th section of the Companies Act, "1862," that section being the section which corresponded at that date to section 20 of the present Act which is now in force.

On the whole, if the proper way to construe the articles of association of a company is as a commercial or business document to which the maxim "validate if possible" applies, I think that the plaintiff in this action ought to succeed. Not one of the judges in the case to which I have already referred, *Dean* v. *Prince*,[17] showed any signs of shock or surprise in the assumption there made of a contract between directors being formed by the terms of a company's articles. I am encouraged, not I hope unreasonably, to find in this case a contract similarly formed between a member and member-directors in relation to their holdings of the company's shares in its articles. The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership; see the well-known passages in *In re Yenidje Tobacco Co.*[18]

Nobody, I suppose, would doubt that a partnership deed might validly and properly provide for the acquisition of the share of one partner by another partner on terms identical with those of article 11 in the present case. I do not intend to decide more in the present case than is necessary to support my conclusion, though it may be that the principles upon which my conclusion is founded are of more general application than might be supposed from some of the authorities on the point.

I will make an appropriate declaration of the plaintiff's rights, or will order the defendants to give effect to them, and if necessary there must be an inquiry to ascertain the fair value of the shares. I am asked not to decide what is the proper date at which the value of the shares is to be fixed, as to which indeed there be no question, but to leave these to be either agreed or decided hereafter. There must be liberty to apply.

Declaration accordingly.

Solicitors: *Simpson, Palmer & Winder; Mark Lemon.*

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[17] [1954] Ch. 409.

[18] [1916] 2 Ch. 426; 32 T.L.R. 709.

1959
June 15, 16.

Roxburgh J.

NARCISSI *v.* WOLFE.

Landlord and Tenant—Business premises (security of tenure)—Application for new tenancy—"The holding"—Part of premises sublet on furnished tenancy—Part temporarily occupied in connection with business—Whether occupation by tenant—Date of designation of property constituting holding—Whether court should investigate purpose of occupation—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23 (3), 32 (1).

By section 32 (1) of the Landlord and Tenant Act, 1954, " . . . an "order under section 29 of this Act for the grant of a new tenancy "shall be an order for the grant of a new tenancy of the holding; "and in the absence of agreement between the landlord and the "tenant as to the property which constitutes the holding the court "shall in the order designate that property by reference to the "circumstances existing at the date of the order." By section 23 (3) of the Act " . . . the expression 'the holding,' in relation to a "tenancy to which this Part of this Act applies, means the property "comprised in the tenancy, there being excluded any part thereof "which is occupied neither by the tenant nor by a person employed "by the tenant . . ."

A tenant, who applied for a new lease of the whole of the property comprised in the current lease, at the date of the application used the ground floor and basement in connection with his restaurant business and sublet the three upper floors as furnished flats. After the commencement of the proceedings but before the hearing, the subtenant of the first-floor flat gave up his tenancy, and the tenant, as he had been warned by the Medical Officer of Health not to use the basement for the storage of food not in sealed containers, stored a certain amount of food on the first floor. The tenant left some furniture in the first-floor flat; he had, on one occasion, spent the night there; and he occasionally used a table for office work in connection with the restaurant. The subtenants continued in occupation of the second and third floors. The landlord agreed that a new lease should be granted, but contended that the holding consisted of the ground floor and basement only. The tenant admitted that the use of the first floor for storage was a temporary measure until the basement was repaired; and that, by using it himself, he hoped to obtain a new lease which included the first floor:—

Held, (1) that the date at which the property constituting the holding was to be designated was the date of the order of the court and not the date of the application.

(2) That the second- and third-floor flats were occupied by the subtenants and not by the tenant, and must, accordingly, be excluded from the holding.

(3) That in designating the property which constituted the holding it was not for the court to investigate a tenant's purpose in

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[Reported by VERITY ANN MOXON, Barrister-at-Law.]

occupying the property but to see whether the occupation was genuine or not; that, since he was in real need of storage space, albeit it might be a temporary need, it was impossible to say that the tenant's occupation of the first floor was not genuine and that, therefore, at the material date the holding of which the tenant was entitled to have a new lease comprised the basement, ground floor and first floor.

ORIGINATING SUMMONS.

By a lease dated January 6, 1938, premises known as No. 5, Panton Street, Haymarket, in the county of London, were let for a term of 21 years from December 25, 1937. The present tenant, Celeste Narcissi, a restaurateur, was the successor in title of the original tenant; and the present landlord, Henry Lucien Wolfe, was the successor in title of the original landlord. The premises consisted of a ground floor, basement and three upper floors, and by a notice dated February 20, 1958, under the Landlord and Tenant Act, 1954, the tenant proposed that the landlord should grant him a new tenancy of the whole of the premises for a term of 14 years from December 26, 1958, at a rent of £1,000 per annum. On April 18, 1958, the landlord gave notice that he intended to oppose the application for a new lease on the ground that the holding consisted of the ground floor and basement only and, alternatively, that he had offered to provide alternative accommodation; and offered the tenant a lease of the ground floor and basement for a term of seven years from December 25, 1958, at a rent of £1,200 per annum.

At the date of the commencement of the proceedings the tenant was using the basement and ground floor in connection with his business of a restaurateur and the three upper floors were let furnished to subtenants. The tenancy agreements relating to the furnished flats came to an end on December 25, 1958, but the subtenants of the second- and third-floor flats continued in occupation on terms that they would leave the rooms if the tenant was required to give up his lease, that they would not sublet the rooms, take lodgers or remove any of the furniture and that the tenant was to clean the entrance passages and staircases and should be entitled to enter the rooms at any time for inspection or to remove or replace any of the furniture.

The subtenant of the first-floor flat left on February 21, 1959, and thereafter the tenant, who had been told by the Medical Officer of Health not to use the basement other than for the storage of food in sealed and vermin proof containers and the initial preparation of root vegetables subsequently cooked, used the first floor for the storage of a certain quantity of food. He also kept some furniture there, and on one occasion had spent the night there. He sometimes used a table on the first floor for writing cheques and making out bills, although he kept his stationery and invoices downstairs.

The master adjourned into court the question whether a new lease should be granted and, if so, whether of the whole or part of the premises. In December, 1958, the case was referred back to chambers for further evidence which was then filed.

Lionel Blundell Q.C. and *Harry Lester* for the tenant. The question is whether the tenant occupies the three upper floors. If he does, those floors will be included in the holding. The court designates the property comprised in the holding by reference to the facts existing at the date of the order for a new tenancy: section 32 (1). "The holding" is defined in section 23 (1), and is, prima facie, the property comprised in the tenancy. That includes the whole of No. 5, Panton Street.

[*Roger Ormrod Q.C.* intervening. In using the first floor as part of the restaurant the tenant may be in breach of covenant.]

On the true construction of this covenant the tenant has the right to use the demised premises for a restaurant, "including "the sale of tobacco, confectionery and other similar produce," and has an alternative right to use the whole premises as "offices "and showrooms for such business to be first approved by the "landlord." He is entitled to use the whole or any part of the property as a restaurant without consent, but if he wants to introduce some business not covered by that part of the covenant he must get the landlord's consent. "Such business" cannot mean "the said business," because it relates to an alternative right.

The test is: does the tenant occupy the premises? As regards the first floor, there is occupation for storage and, to some extent, residentially. The test being occupation and not use, the court is only concerned with the indications of use to show the bona fides of the occupation. The tenant, not having adequate space for food storage in the ground floor and basement, is using the first floor for that purpose as well as for occasional sleeping accommodation.

As regards the second and third floors, the tenant has furniture of his in the flats and has the right to remove and replace it. It is submitted that, as he has furniture in these flats, he is in occupation of them even though they are sublet. In *Hills* (*Patents*)

Ltd. v. *University College Hospital Board of Governors* [1] Denning L.J. said that the Minister and the Governors were both in occupation. There was a hierarchy of occupation, not joint occupation: that is an illustration of two persons being in occupation, although they are not joint occupiers. Although the second- and third-floor flats are, in one sense, occupied by the subtenants, they do not fall to be excluded from the holding. Looking at the relationship between the landlord and the tenant, the tenant cannot be said to be wholly out of occupation. The fact that a tenant has his furniture in the demised premises makes him the occupier for rating purposes: *Southend-on-Sea Corporation* v. *White.*[2] It is submitted that, when a tenant puts his furniture in the premises before he sublets, he is in occupation. Therefore, since section 23 (3) is directed to excluding, on the grounds of non-occupation, part of the premises which is prima facie included in the holding, that part of the premises is not excluded if that which constituted occupation (i.e., the furniture) is still there even if he has sublet the premises. [Reference was made to *Bagettes Ltd.* v. *G. P. Estates Ltd.*[3]]

Roger Ormrod Q.C. and *J. D. F. Moylan* for the landlord.

[Roxburgh J. I will not trouble you on the second and third floors, but I will hear you as to the first floor.]

"Occupation" in the Act means real occupation in the practical sense of the word: see, for example, sections 41 and 42. Rating cases do not help, because the purposes of the two Acts are different. The occupation of a servant is occupation by his master for rating purposes. That is not so under this Act. The principle of the Act is set out by Jenkins L.J. in *Bagettes'* case,[4] where he refers to the long title of the Act. The Act was not designed to protect the business but the premises from which it is carried on, together with any part of the premises which the tenant is using himself. That is why as soon as any part of the premises is occupied by a subtenant it is excluded from the holding. The presence of furniture on the first floor does not constitute occupation.

The use of the first floor as an office is in breach of covenant. If the tenant wanted to use the upper floors for some purpose other than residential purposes he had to get consent. Where there is a provision that the premises shall not be used for business purposes at all, and the tenant uses them as such without consent or acquiescence, it is not a business tenancy: see section 23 (4), which is directed to whether there is a business tenancy or not and not to the question of the holding. There are two stages, (1) whether there is a business tenancy or not; this is admitted as regards the ground floor and the basement but not as regards the upper floors; (2) what is the holding? The holding cannot consist of any part of the premises which are being occupied in breach of covenant unless there has been acquiescence on the part of the landlord.

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[1] [1956] 1 Q.B. 90, 99; [1955] 3 W.L.R. 523; [1955] 3 All E.R. 365.

[2] (1900) 17 T.L.R. 5.

[3] [1956] Ch. 290; [1956] 2 W.L.R. 773; [1956] 1 All E.R. 729.

[4] [1956] Ch. 290, 301.

Lionel Blundell Q.C. replied.

ROXBURGH J. This is an application under Part II of the Landlord and Tenant Act, 1954. There was a current tenancy of the premises under a lease made on January 6, 1938, for a term of 21 years from December 25, 1937, which expired on December 25, 1958, this application being made on June 3, 1958, and all the requisite notices have been given. The matter came before the master who adjourned into court the question whether a new lease should be granted and, if so, whether of the whole or part of the premises. On the first question it is conceded that a new lease should be granted of something and, accordingly, I order today the grant of a new tenancy in pursuance of this Act. The second question is by no means a matter of consent.

Section 23 (3) of the Landlord and Tenant Act, 1954, provides: " In the following provisions of this Part of this Act the " expression ' the holding ' in relation to a tenancy to which this " Part of this Act applies, means the property comprised in the " tenancy,"—that, of course, is the whole of No. 5, Panton Street—and then come these most important words: " there " being excluded any part thereof which is occupied neither by " the tenant nor by a person employed by the tenant and so " employed for the purposes of a business by reason of which " the tenancy is one to which this Part of this Act applies."

I am not concerned with occupation by a person employed, but only with the question whether some part of the premises is to be excluded on the ground that it is not occupied by the tenant.

Section 29 (1) provides: " Subject to the provisions of this " Act, on an application under subsection (1) of section 24 of " this Act for a new tenancy the court shall make an order for " the grant of a tenancy comprising such property, at such rent " and on such other terms, as are hereinafter provided." By section 32 (1): " an order under section 29 of this Act for the

" grant of a new tenancy shall be an order for the grant of a " new tenancy of the holding; and in the absence of agreement " between the landlord and the tenant as to the property which " constitutes the holding the court shall in the order designate " that property by reference to the circumstances existing at the " date of the order."

Section 33 provides: " Where on an application under this " Part of this Act the court makes an order for the grant of a " new tenancy, the new tenancy shall be such tenancy as may " be agreed between the landlord and the tenant, or, in default " of such an agreement, shall be such a tenancy as may be " determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, " a tenancy for a term not exceeding 14 years, and shall begin on " the coming to an end of the current tenancy." Section 34 deals with rent in the same sort of phraseology. Section 35 is somewhat similar: " The terms of a tenancy granted by order " of the court under this Part of this Act (other than terms as " to the duration thereof and as to the rent payable thereunder) " shall be such as may be agreed between the landlord and the " tenant or as, in default of such agreement, may be determined " by the court; and in determining those terms the court shall " have regard to the terms of the current tenancy and to all " relevant circumstances."

This building consists of a basement, a ground floor and three upper floors, the 1st, 2nd and 3rd. To start with, the lease is ambiguous: it states that the original tenant was a restaurant proprietor, and then it says this, and this is one of the tenant's covenants: " Not to use the demised premises otherwise than " for the trade or business of a restaurant proprietor including " the sale of tobacco confectionery and other similar produce " and/or as offices and showrooms for such business to be first " approved by the landlord in writing such approval not to be " unreasonably withheld or as to the floors of the said premises " above the ground floor without any such consent for private " residential purposes. . . ."

Mr. Blundell has asked me to construe that as though for the word " such " is substituted the word " any." I do not feel able to do that. It is altering the document; and if the doctrine falsa demonstratio is applied the difficulty is not in saying that something has gone wrong, because that is obvious, but in saying precisely what has gone wrong. Mr. Ormrod asks me to construe it as though he could not use any part of the demised premises for the business of restaurant proprietor except the ground floor and basement without consent. I do not feel able to construe it in that way because it does not say so; and, again, if I try to apply the doctrine of falsa demonstratio I am in the same difficulty as I do not know what was intended. The best I can do is to construe it in this way: that the tenant, who was a restaurant proprietor, was able to use the whole premises for the trade or business of a restaurant proprietor if he wanted to; that he could, without any permission, use the first and second and third floors, but not the ground floor or basement, for private residential purposes. On the whole I think "such "business" refers to tobacco, confectionery and similar produce, and I have come to the conclusion that the words "to be first "approved by the landlord in writing" relate to "the sale of "tobacco confectionery and other similar produce and/or as "offices and showrooms for such business." The reason why I have had to construe this clause will become apparent later.

Up till February 21, 1959 (that is to say, after the issue of these proceedings), there was no doubt as to what was comprised in the holding, namely, the ground floor and the basement, because all the other three floors were let to subtenants, furnished.

[His Lordship referred to the terms of the tenancies of the second and third floors and continued:] With regard to the second and third floors the sole question is whether they are occupied by the tenant. I do not think that anything which has been said to me throws any real light on the meaning of the word "occupied" in this case. There is a lot of law about the word "occupied" but that does not appear to me to be applicable to this Act. The Court of Appeal in *Bagettes Ltd.* v. *G. P. Estates Ltd.*[1] held that certain flats, which were unfurnished, were occupied by the tenants and not by the landlords, but the court never mentioned the word "furniture," either to comment on its absence or in any connection whatsoever. I do not think that that case throws any light on the question whether a furnished flat, let on the terms in the present case, is occupied by the tenant or by the subtenant; but, applying common sense, it seems to me that the second- and third-floor flats are occupied by the subtenants and not by the tenant.

The first floor stands in quite a different position. It is to be noted that section 32 (1) of the Act provides that the date at which the property which constitutes the holding is to be designated is the date of this order and not the date of the issue of the application. It is not for me to discuss the wisdom of such a provision, except to say that it does lend itself to the possibility of abuse and that is really the question before me today. Mr. Ormrod says that this alleged occupation by the tenant of the first floor since February 21, 1959, is merely colourable, whereas Mr. Blundell says it is genuine and that is really the only question which I have to decide.

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[1] [1956] Ch. 290; [1956] 2 W.L.R. 773; [1956] 1 All E.R. 729.

[His Lordship referred to the evidence and continued:] The tenant indicated that there were two things that he was interested in and hoped to achieve: one was a new lease of the whole of the premises and the other was the renovation and to some extent reconstruction of the basement to which, in his view, the landlord ought to contribute. He made no secret of the fact that if he could achieve both these objects he would cease the use of the first floor himself for the purpose of his business. He was using the first floor in part to try to take advantage of the opening which Parliament has accorded to him by section 32; and I can see nothing against his doing so when Parliament has provided him with the opportunity. The question is whether or not there was a real occupation, however conditional, or whether it was a merely colourable occupation.

[His Lordship referred to the evidence of the occupation by the tenant of the first-floor flat and continued:] The purpose of the occupation of the first floor was, in part, to try to get a new lease, and the occupation was with a temporarily designed object. I do not think that it is my business to investigate the tenant's purpose; it seems to me that Parliament has invited something of this sort, that what I have to do is to see whether there is a real occupation or whether it is simply colourable.

I cannot say that it is simply colourable. It may be that the mere fact that what remained in the flat was the tenant's was enough to make the occupation revert to him when the subtenant left. I deliberately refrain from deciding that question, but it is a point which I cannot entirely ignore. There was this furniture on the first floor and, while it might not be enough in itself, it is an item in the schedule of points to be considered.

I propose to eliminate altogether the use of the premises as office accommodation, for that seems to me to have been almost negligible and a breach of covenant. I am inclined to accede to Mr. Ormrod's argument that, under the Act, occupation cannot be based upon acts of occupation which are in breach of covenant. That is why I had to construe the meaning of the covenant at the beginning of my judgment. That does not, however, apply either to the one night when the tenant slept in the first-floor flat or to its use for storage; it does not seem to me that either of those acts was a breach of covenant, but that is why I have eliminated the office user. I am not going to decide whether the use of the first floor for one night's residence in several months would be enough. The really important matter, in my judgment, is one about which there is no real conflict of evidence, and that is the use of the first floor for storage purposes in connection with the tenant's business as a restaurateur.

I accept the evidence that the tenant was in real need of storage accommodation and will continue to be in such need until the basement is put into a condition in which it can be used for storing any food. It is that aspect of the case which makes it impossible for me to say, in this case, that the occupation was merely colourable.

Therefore, I hold that today, the date of the order I propose to make, the tenant is in occupation of the first floor and, accordingly, I designate the holding as being the basement, the ground floor and first floor, but excluding the second and third floors.

Order for a new tenancy accordingly.

Solicitors: *Lesser, Fairbank & Co.; Arthur Hunt & Hunt.*

1959
July 24.

Vaisey J.

In re BENNETT, DECD.
SUCKER *v.* ATTORNEY-GENERAL.

[1959 B. 1420.]

Charity—Royal prerogative—Bequest to non-existent body—No trusts in the will—Charitable intention—Whether application by way of scheme or under royal prerogative.

A testatrix gave a quarter share of her residuary estate to "The "Hospital for Incurable Women of Brompton Road, London." No body of that name existed; and, notwithstanding the appointment of executors and trustees, the will contained no trusts. On a summons by the executors asking the court to direct a scheme for the disposition of this share of the residuary estate:—

Held, that, the gift being by way of direct gift and not by way of trust, the court of equity had no jurisdiction to direct a scheme, and the gift must be applied in accordance with the directions of the Queen under the royal prerogative.

Moggridge v. *Thackwell* (1802) 7 Ves. 36 and *Paice* v. *Archbishop of Canterbury* (1807) 14 Ves. 364 applied.

ADJOURNED SUMMONS.

Laura Sarah Bennett, by her will dated March 28, 1957, appointed the plaintiffs, Ellen Emma Sucker and Robert Bush, as her executors. By clause 4 thereof she provided: "I devise "and bequeath all my real and personal estate whatsoever and "wheresoever not hereby or by any codicil hereto otherwise "specifically disposed of . . . but subject to and charged with "the payment of my debts funeral and testamentary expenses "and the legacies bequeathed hereby or by any codicil hereto "and the duties on any such legacies bequeathed free of duty "to" four named institutions, one of which was "The Hospital "for Incurable Women of Brompton Road, London," in equal shares absolutely. The testatrix died on January 31, 1958. One quarter of her residuary estate was of the approximate value of £1,350.

According to the evidence the only institutions to be found which might answer to the description "The Hospital for "Incurable Women of Brompton Road" were the British Home and Hospital for Incurables and the Royal Hospital and Home for Incurables, both of whom had relinquished any formal claim to the one-quarter share of residue.

The executors took out the present summons asking that a scheme might be settled for the disposition of the one-quarter share of the residuary estate of the testatrix bequeathed to "The Hospital for Incurable Women of Brompton Road, "London. . . ."

Denys Buckley for the Attorney-General. The court cannot in the circumstances of this will direct a scheme. The jurisdiction of the court to execute charitable trusts by way of scheme depends upon the existence of a trust: it is the existence of a trust which clothes the court with jurisdiction. On the other hand, if there is a direct gift for some charitable purpose—for instance, "I give my residue to the poor"—then the proper method of regulating such a gift lies in the prerogative of the Crown to direct how the property shall be applied under the sign manual: see Tudor on Charities, 5th ed., pp. 174–177, and Tyssen's Charitable Bequests, 2nd ed., p. 183.

The leading authority on this question is the statement of Lord Eldon in *Moggridge* v. *Thackwell* [1] that where money is given to charity generally and indefinitely without trustees or objects being selected, the King as parens patriae is the constitutional trustee. In *Paice* v. *Archbishop of Canterbury* [2] (which confirmed *Moggridge* v. *Thackwell* [3]) Lord Eldon restated the rule more succinctly and said [4]: "Where the bequest is to "trustees for charitable purposes, the disposition must be in "that mode [i.e. by a scheme]; but, where the object is charity, "without a trust interposed, it must be by sign manual."

Three cases in line with *Moggridge* v. *Thackwell* [5] are mentioned in the notes to *Reeve* v. *Attorney-General*,[6] *Simon* v. *Barber*,[7] *Thorley* v. *Byrne* [8] and *Sanford* v. *Gibbons*.[9] They are precisely in line with the present case, being gifts to non-existent charitable bodies, and they were all applied under the sign manual. This principle was also applied in *Attorney-General* v. *Syderfen*,[10] where a devise of £1,000 for such charity as the testator had by writing appointed, no such writing being found, was applied by the King under the sign manual. An attempt was made to clear up this question in *In re Pyne*,[11] but it proved to be slightly abortive.

There is no trust in respect of the gift in the present case. It is not a case for the appointment of new trustees, because there is nothing for them to do. Accordingly, the court is asked to declare that this is a charitable gift which should be administered by the Crown under the sign manual.

The Attorney-General is here to protect the royal prerogative, not to argue against the charitable interest; the bequest goes to charity by either route, whether administered by the Crown or under a scheme directed by the court.

There are three cases, which are rather contrary to these submissions, but they can be distinguished: *Bennett* v. *Hayter*,[12] *In re Clergy Society* [13] and *In re Maguire*.[14] In *Bennett* v. *Hayter* [15] a life interest was interposed before the charitable gift which indicated the existence of a trust; similarly in *In re White* [16] it was decided that there was a trust, and that let in

[1] (1802) 7 Ves. 36, 83.
[2] (1807) 14 Ves. 364.
[3] 7 Ves. 36.
[4] 14 Ves. 364, 372.
[5] 7 Ves. 36.
[6] (1843) 3 Hare 191.
[7] (1829) 3 Hare 195n.
[8] (1830) 3 Hare 195n.
[9] (1829) 3 Hare 195n.
[10] (1683) 1 Vern. 224.
[11] [1903] 1 Ch. 83.
[12] (1839) 2 Beav. 81.
[13] (1856) 2 K. & J. 615.
[14] (1870) L.R. 9 Eq. 632.
[15] 2 Beav. 81.
[16] [1893] 2 Ch. 41.

the principles laid down by Lord Eldon. With the exception of *In re Maguire*,[17] where this point was not really canvassed at all, and *In re Clergy Society*,[18] which, it is submitted, was wrongly decided, the cases are all consistent with the statement of Lord Eldon that the jurisdiction of the court is dependent on the existence of a trust, otherwise the gift is applicable by the Crown under the sign manual.

Directions are frequently given under the sign manual without coming to the court. It is a useful and beneficent procedure, often resorted to, and it should not be encroached on.

In *Simon* v. *Barber*[19] a gift to a non-existent hospital was applied under the sign manual; similarly here it is a gift to a hospital for women suffering from incurable diseases, which is not to be found and, there being no trust, it is therefore beyond the jurisdiction of the court and it rests with the Crown to apply it.

Raymond Walton for the executors. In a case of this nature a scheme is appropriate. The true distinction between cases where a scheme is directed and cases dealt with under the sign manual is whether there is a sufficient definition of the charity or whether it is completely indefinite. That is difficult to follow out at times and not all the cases can be reconciled.

The question which has to be asked is whether from the description which the testator has given there is sufficient material on which the court can work to formulate a scheme. If it is a gift to charity generally the court cannot know where to start, and then the gift must go under the sign manual. How could the court begin to execute a charity "for the poor"? That would be an impossible and invidious task for the court, and the sign manual would extend to that sort of case. Here there are a number of indications; it is for the benefit of women suffering from incurable disease, there are two hospitals for those purposes —neither is in the Brompton Road, but they are in London, although not of the particular name and title given in the will.

Clifford v. *Francis*[20] supports this proposition; there it was held that where money is given to a charity without expressing what charity, then the King is disposer of the charity, but if the charity be expressed, then it is in the power of the Commissioners for Charitable Uses. What Lord Eldon said in *Moggridge* v. *Thackwell*[21] itself was that where there is a general indefinite purpose, not fixing itself upon any object—as the gift in some degree does here—the disposition is in the King by sign manual; but where the execution is to be by a trustee with some objects pointed out, then the court will take the administration of the trust. On that basis the cases can be reconciled. Where an object is indicated, although imperfectly, that does not fall within the province of the Crown under the sign manual.

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[17] L.R. 9 Eq. 632.

[18] 2 K. & J. 615.

[19] 3 Hare 195n.

[20] (1679) Freem.K.B. 330.

[21] 7 Ves. 36.

It was admitted that *In re Clergy Society*[22] is against the Attorney-General's argument, but the court was asked to say that it was wrongly decided. Tudor supports the submission that the royal prerogative does not touch this case. It was sought to distinguish *Bennett* v. *Hayter*[23] by saying that that gift was after a life interest and the payments would ultimately fall to be made by trustees, but in fact the gift was to a simple non-existent charity, and if that is enough to constitute a trust, then equally it is so in the present case when payment will be made by the personal representatives, because they have the money in their hands.

[VAISEY J. Do you mean to say that it would be different if the tenant for life had not survived the testator, and the fact whether or not the tenant for life survives the testator affects the royal prerogative?]

On the Attorney-General's argument it does; it does not say in *Bennett* v. *Hayter*[23] whether or not the tenant for life survived the testator, but the Master of the Rolls did not place any reliance on it; what was argued was that there must have been trustees because there was a life interest. The trustees were not mentioned in the report, but were imported into the argument of the Attorney-General because there was a life interest. *Moggridge* v. *Thackwell*[24] was cited in *Bennett* v. *Hayter*,[25] and it must have been on this point. It seems to have been a direct gift, and that case is really in my favour. In *In re White*[26] reliance was also placed on the existence of a life interest; it is submitted that there was not an interposed trust there, but that it was a simple direct gift, and the judgment of the Court of Appeal did not turn upon the presence of trustees. *Moggridge* v. *Thackwell*[27] was cited there also, but this point does not appear to have been actually debated.

In *In re Maguire*[28] there was a bequest to a non-existent named charity in Ireland and it was held that it should be applied for the benefit of a society there with the same objects.

[22] 2 K. & J. 615.
[23] 2 Beav. 81.
[24] 7 Ves. 36.
[25] 2 Beav. 81.
[26] [1893] 2 Ch. 41.
[27] 7 Ves. 36.
[28] L.R. 9 Eq. 632.

[VAISEY J. It is exactly the same as this case.]

Exactly the same. If the argument of the Attorney-General be correct, the court must say that *In re Maguire* [28] is wrong, but no doubts have been cast on it hitherto.

[VAISEY J. It is very difficult to see why that was not applied under the royal prerogative, if the royal prerogative exists.]

It is on all fours with this case. The three cases on the other side—*Simon* v. *Barber*,[29] *Thorley* v. *Byrne* [30] and *Sanford* v. *Gibbons* [31]—all come from the unsuccessful argument of the Attorney-General in *Reeve* v. *Attorney-General*,[32] where it was held that bequests to the "Society for Bettering the Conditions "of the Poor" and the "Society for the Encouragement of "Female Servants" (which were disclaimed by these bodies) did not come under the sign manual, but should be carried into effect by means of a scheme, the trust being originally for certain definite objects.

If it be absolutely necessary to establish a trust before the court can intervene, then it is submitted that the mere gift to a hospital is a gift on trust, because a gift to a named hospital is really a gift for the purposes of that hospital: *In re Morgan's Will Trusts*.[33] It is not suggested that a trust exists merely because the testatrix appointed executors and trustees; from first to last no duties were cast on them.

The principal textbook agrees with the decisions of *In re Maguire*,[34] *Bennett* v. *Hayter* [35] and *In re Clergy Society* [36]: see Tudor, p. 177. It is submitted that a scheme is therefore the correct method of carrying out this bequest.

Buckley in reply. In *Clifford* v. *Francis* [37] a completely different test was applied from that laid down by Lord Eldon. The court can formulate a scheme whenever purposes, however vague, are prescribed: see *In re Pyne*.[38] The jurisdiction of the court depends on there being someone upon whose conscience a court of equity can work This is a court of equity and the only way it can work is where its orders can be carried out by someone in the position of a trustee. The test propounded on behalf of the executors is quite novel; it does not accord with *Moggridge* v. *Thackwell*.[39]

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[28] L.R. 9 Eq. 632.

[29] 3 Hare 195n.

[30] 3 Hare 195n.

[31] 3 Hare 195n.

[32] 3 Hare 191.

[33] [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097.

[34] L.R. 9 Eq. 632.

[35] 2 Beav. 81.

[36] 2 K. & J. 615.

[37] Freem.K.B. 330.

[38] [1903] 1 Ch. 83.

[39] 7 Ves. 36.

VAISEY J. In this case the question is whether a defect in the will ought to be put right by way of scheme or whether it is a matter which falls to be dealt with under the royal prerogative. [His Lordship stated the facts and continued:] It is a curious thing that the matter seems on the authorities to depend almost entirely on this principle: was the gift to the non-existent beneficiary created by means of a trust or by a direct gift? If it was created by means of a trust, then the usual procedure would follow, and it would be for the court to decide, in the familiar way, by way of scheme what should be done with the disputed amount. If, on the other hand, the gift to the non-existent hospital is not by way of trust but a direct gift, then under a very long series of authorities (not altogether consistent and not altogether easy to interpret) it falls to be dealt with by the royal prerogative.

The problem is stated at great length in Tudor on Charities, 5th ed., Chap. V, sect. 1, p. 174: "The Court and the Crown." It appears rather curious at first sight that if there is a trust it should fall to the ordinary jurisdiction of the court of equity to resolve a difficulty of this kind, but that if there is not a trust then it is a matter for the Sovereign acting under the royal prerogative.

The leading case on the subject (which is not the first) is *Moggridge* v. *Thackwell.*[1] Although it seems as if this point may to some extent and on some occasions have been overlooked, and that the distinction between a gift by way of trust and a gift which is direct has not been fully considered, and in some of the cases appears to have been disregarded, it may well be that a fuller statement of the facts and a closer consideration of the terms of the instruments in question would throw a different light on the matter and make those cases reconcilable. I am not going to refer to them, but there are admittedly three cases which seem to be out of line and step with that principle and in which the court has apparently been induced to deal with the matter as if the disposition were by way of trust when, so far as the report shows, it was otherwise [*In re Clergy Society*[2]; *Bennett* v. *Hayter*[3]; *In re Maguire*[4]]. I do not think that it is necessary to attempt to reconcile these authorities. I have referred already to *Moggridge* v. *Thackwell,*[5] and there is also *Paice* v. *Archbishop of Canterbury*[6]; and it may well be that the distinction has not been carefully attended to on more than one occasion in the past. Having accepted from Mr. Walton that there is a difficulty about some of the cases, on looking at the matter and the authorities broadly, I think that in this case, where there clearly is not a trust but an ordinary gift to a non-existent charitable institution, the principle of *Moggridge* v. *Thackwell*[7] and *Paice* v. *Archbishop of Canterbury*[8] applies. There is undoubtedly some uncertainty about the position, but, after all, I am not giving a disquisition on the whole of the law on this rather obscure subject; I am considering what has to be done in this particular case where there is the admitted puzzle of a gift to a non-existent institution in terms which quite clearly import a charitable intention. There is a plain, unambiguous and undoubted devotion to charity and the only question is how that gift should be implemented and carried out.

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[1] (1802) 7 Ves. 36.
[2] (1856) 2 K. & J. 615.
[3] (1839) 2 Beav. 81.
[4] (1870) L.R. 9 Eq. 632.
[5] 7 Ves. 36.
[6] (1807) 14 Ves. 364.

Without saying that the decisions are unanimous, or wholly free from ambiguity, I think that in a simple case such as this, as between the jurisdiction arising from the royal prerogative and the ordinary equitable jurisdiction of the court, however little difference it may probably make in the end, the position should be most carefully safeguarded. However long I continued to hear this case, and to investigate the various authorities in which the point has either been ignored or apparently disregarded or the position misunderstood, I feel no doubt at all that I should in the end come to the conclusion that this is a case in which the royal prerogative must be appealed to, to enable justice to be done. Quite clearly there is no trust in this case, although there are references to trustees in the will in which the gift is made; first of all, certain persons are appointed to be executors and trustees of the will of the testatrix, and they are defined in this way: "they or the survivor of them or other the trustees for "the time being hereof are hereinafter called my trustees." That certainly indicates that there will be some trusts, as it defines the persons whom the testatrix designated as trustees clothed with a trust of some kind; but, curiously enough, none are to be found. There are two references in a common-form clause that the receipt of the treasurer or secretary of an institution is to be a good discharge for the testatrix's trustees; but that does not create a trust of any sort or kind.

There is, therefore, this gift, ambiguous so far as the personality of the legatee is concerned, not given by way of trust, but given straight away by way of immediate gift. Although by looking at one or two of the authorities in isolation it might appear that one should come to a different conclusion, I do not think that I can do that. But, on looking at all the authorities, once I have come to the conclusion that there is not a trust but only a direct gift, and to the further conclusion that there is here an ambiguity to be resolved, I cannot see that this court, as a court of equity, has any jurisdiction. As Mr. Buckley pointed out, my jurisdiction is based almost exclusively on the supposition of a trust; and, as no trust can be found, I must decide that the difficulty falls to be resolved by an appeal to the royal prerogative.

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[7] 7 Ves. 36.

[8] 14 Ves. 364.

I do not say the jurisdiction of the court is exclusively based on the existence of a trust, but in this type of case I am powerless to act, and an appeal must be made to Her Majesty to resolve it in the appropriate and proper way. Certainly I have no duty to insist upon the court's jurisdiction unless I am quite satisfied that the court ought to have jurisdiction. The jurisdiction of this court is derived from the Crown; there is no kind of conflict, and the only question is whether this peculiar particular problem falls within my jurisdiction as a judge of the High Court or has to be dealt with away from this court by the authority which is at the base of both jurisdictions; that is to say, by the Crown itself. I do not deny that some of the cases are a little difficult, but in this particular case where the executors ask for a scheme to be settled for the disposition of this one-quarter share of the residue, I cannot direct a scheme, and the proper course is to declare that this matter falls within the jurisdiction which belongs to Her Majesty by virtue of the royal prerogative, illustrated in the cases which I have named and many others, and to let the matter be referred through the appropriate channels so that this question may be settled. I will declare that the bequest of one quarter of the residue for the Hospital for Incurable Women of Brompton Road is a valid charitable bequest and ought to be applied in accordance with the directions of Her Majesty under the royal prerogative.

Declaration accordingly; costs to be taxed and paid out of the residuary estate.

Solicitors: *Treasury Solicitor; Smith & Hudson for Jackson & Walton, King's Lynn.*

I. G. R. M.

ABBOTT *v.* PHILBIN (INSPECTOR OF TAXES).

C. A.

1959
Oct. 2, 5, 6.

Lord Evershed M.R., Sellers and Harman L.JJ.

Judicial Precedent—Scottish decision—Statute applicable to Scotland and England—Revenue statute—No peculiarity of Scots law involved —Decision not per incuriam—Whether Court of Appeal bound by Court of Session.

Revenue—Income tax—Employment—Perquisite—Option to purchase shares—Purchase of option to subscribe for shares in employing company—Whether perquisite—Whether emolument—Whether taxable in the year of purchase or the year of exercise—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In October, 1954, the taxpayer, who was at all material times secretary of a company, was granted an option to purchase 2,000 ordinary shares in the company at the price of 68s. 6d. per share. The price of the option was £20, and it was expressed to be non-transferable and to expire after 10 years or on the earlier death or retirement of the taxpayer. In March, 1956, when the market price of the shares was 82s. per share, the taxpayer exercised the option in respect of 250 shares. The taxpayer was assessed to income tax under Schedule E of the Income Tax Act, 1952,[1] in the year 1955–56 on the difference between the option price and the market price of the shares (with a deduction of a proportionate part of the cost of the option), as being an emolument received by him by virtue of his employment. Roxburgh J. allowed the taxpayer's appeal against the assessment being made in the year 1955–56 and held that it should have been made in the year 1954–55:—

Held, allowing the appeal, and following *Forbes' Executors* v. *Inland Revenue Commissioners*, 1958 S.C. 177; 38 T.C. 12, that the taxpayer should be assessed under Schedule E in respect of the year 1955–56 when the option was exercised. In *Forbes'* case the Court of Session had held that an option, in all relevant respects the same as that of the taxpayer, could not be turned to pecuniary account at the date of its grant and therefore, whether or not it might otherwise be a perquisite, it could not be taxed at that date and in respect of the year of its grant under Schedule E, but was taxable only and not before the option was exercised.

Although the Court of Appeal is not bound to follow decisions of the Court of Session, since (1) there were no propositions peculiar to Scots law which formed the basis of their decision; (2) the relevant revenue statutes applied indifferently in England and Scotland; (3) that case was argued on all the points taken before the Court of Appeal, for reasons of policy it would not be right that this court should express a diametrically opposite view (post, pp. 47 to 51).

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[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall "be annually charged on every per- "son having or exercising an office "or employment of profit mentioned "in Schedule E, . . . in respect of all "salaries, fees, wages, perquisites or "profits whatsoever therefrom for the "year of assessment . . ."

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Bridges (*Inspector of Taxes*) v. *Bearsley* [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289 considered.

Decision of Roxburgh J. [1959] 1 W.L.R. 667; [1959] 2 All E.R. 270 reversed.

APPEAL from Roxburgh J.[2]

The taxpayer, Edward Cranfield Abbott, appealed to the special commissioners against an assessment for the year 1955–56 made upon him under Schedule E of the Income Tax Act, 1952, in respect of emoluments from his employment. The question for the decision of the commissioners was whether the taxpayer was assessable for the year 1955–56 in respect of an option granted to him by his employing company to subscribe for shares, such option having been exercised in the year 1955–56, or whether he was not so assessable (as he contended) but was assessable in the previous year in which the option was purchased by him.

The following facts were proved or admitted before the commissioners: The taxpayer was at all material times the secretary of a company, E. S. & A. Robinson Ltd., which carried on business as wholesale stationers. At the annual general meeting of the company held on June 28, 1954, the following resolution was passed: "That 250,000 of the 290,319 unclassified shares of "£1 each in the capital of the company be and they are hereby "classified as ordinary shares and that the directors be and that "they are hereby authorised to grant options over such 250,000 "ordinary shares or any of them to executives of the company "or its subsidiaries (including managing and other directors who "may for the time being hold office in the management of the "business of the company or any of its subsidiary companies for "the time being) at such times and generally on such terms and "subject to such conditions as they think proper."

Pursuant to that resolution the directors at a board meeting held on October 6, 1954, considered the terms under which options were to be granted. The relevant minute of that board meeting stated that "The secretary produced a list of executives "of the company and its subsidiaries whom the managing direc-"tors had nominated as grantees of share options showing against "the name of each individual the number of shares over which "his option would extend. It was noted that the total number "of shares affected was 243,000 and that the middle price ruling "on the Bristol Stock Exchange today was 68s. 6d. per share.

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[2] [1959] 1 W.L.R. 667; [1959] 2 All E.R. 270.

"It was resolved that pursuant to the resolution of the company passed at the annual general meeting held on June 28, 1954, options in accordance with the said list to subscribe for ordinary shares of the company at 68s. 6d. per share be and they are hereby granted upon the terms and subject to the conditions set out in a letter to be addressed to each grantee, a copy of such letter having been produced to the meeting approved and signed by the chairman for the purpose of identification.

"The secretary was instructed to dispatch today to each grantee letters in the said form."

The salient conditions of the letter were that the employee was granted, at the price of £1 for every 100 shares involved, an option to purchase a specified number of shares at the price of 68s. 6d. per share, such option to be exercisable at any time within 10 years from the date of the grant of the option. The option was expressed to be not transferable and was to expire upon the death or retirement of the employee prior to the 10 years. If the employee desired to purchase the option, he was required to send in a form of application, which accompanied the letter (together with his cheque for the amount specified being the price of the option), whereupon an option certificate would be issued to him. Option certificates were not in fact issued until May 6, 1955, by which time the company had obtained, in response to its application on March 4, 1955, the consent of H.M. Treasury to the issue of shares in response to the exercise of options, and by letter dated May 9, 1955, option holders were so advised.

The taxpayer was included in the selected list of executives in respect of 2,000 shares in the company, and, on October 7, 1954, he sent in an application to the company to purchase an option in respect of such 2,000 shares on the terms of the letter, forwarding with the application his cheque for £20, which was duly cashed by the company. Owing to the circumstances mentioned above, he was not given a certificate until May 6, 1955. The terms and conditions applicable to the option were endorsed on the certificate. The option was expressed to be not transferable and to expire on the holder's death or retirement, or on the tenth anniversary of the date of the grant of the option.

Under the terms of the option any number of shares up to the number of 2,000 could be applied for by the taxpayer, and on March 28, 1956, the price of the company's shares having then risen to 82s., he applied to the company for 250 ordinary shares at the option price of 68s. 6d. per share, sending with such

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application the sum of £856 5s., and he was duly allotted the 250 shares.

The taxpayer was assessed to tax under Schedule E for the year 1955–56 in the sum of £7,086, which included the sum of £166 in respect of the share transaction, that sum of £166 being made up as follows:

	£	s.	d.	£	s.	d.
250 shares taken up on March 28, 1956, when the middle market price was 82s.				1,025	0	0
Deduct: option price 68s. 6d.	856	5	0			
cost of option at £1 per 100 shares	2	10	0	858	15	0
				£166	5	0

Such assessment charged the taxpayer to tax under Schedule E for the year 1955–56 in respect of the benefit received by him by virtue of his employment of being able to purchase shares worth 82s. at a cost of 68s. 6d. (plus a proportionate part of the price of the option).

It was contended on behalf of the taxpayer that the contract of option vested a right of property in him forthwith; that such right represented money's worth and was inherently capable of realisation; that such right was, to the extent of any excess in value over the price paid therefor, an emolument of his employment assessable under Schedule E in the year of assessment 1954–55 and not otherwise; that the shares issued to him in the year 1956 were issued in virtue only of the right of property acquired by him in the previous year of assessment; and that any excess in value of the shares, when issued, over the price paid therefor represented an appreciation in the value of an item of property owned by him, and was not an emolument of his employment.

It was contended on behalf of the inspector of taxes that when the shares were issued to the taxpayer there arose or accrued to him a profit from his employment assessable to tax for the year 1955–56; that the profit so assessable amounted to £166; and that the appeal should therefore be dismissed and the assessment confirmed.

The commissioners gave their decision in writing on April 9, 1958. They considered that the case was indistinguishable from that of *Forbes' Executors* v. *Inland Revenue Commissioners*,[3] and that the decision of the Court of Session in that case given on January 16, 1958, was binding upon them, that, although the taxpayer in the present case had paid a small sum for his option, whereas Mr. Forbes was given his option, that difference was not material, since in each case it was common ground that a benefit accrued to the taxpayer as part of his remuneration, and in each case the rights granted were personal to him. They stated that it was suggested on behalf of the taxpayer that the decision in *Forbes'* case[3] may have turned on some peculiarity of Scots law, but that they could find no support for such a suggestion in the judgment of the Court of Session, and considered that case decisive of the present one. Accordingly, they held that the appeal failed. Figures were subsequently agreed in accordance with their decision and the assessment was confirmed on May 22, 1958.

The taxpayer appealed. The commissioners further stated that in making suggestions in the usual course on the draft case, the solicitors to the taxpayer stated (in effect) that the suggestion that the decision in *Forbes'* case[3] might have turned on some peculiarity of Scots law did not represent one of the taxpayer's contentions; and the commissioners agreed that the suggestion arose incidentally during the course of argument.

Roxburgh J. allowed the appeal from the commissioners and held that the option contract was a chose in action which the taxpayer was enabled to purchase on beneficial terms because of his employment and which could have been turned to pecuniary account soon after its grant and its value should be capitalised and assessed to income tax in the year of assessment 1954–55.

The Crown appealed.

R. E. Borneman Q.C. and *Alan S. Orr* for the Crown. The pecuniary advantage derived from the grant of the option was assessable when the option was exercised and not before. That was the earliest time when the option could be turned to account. The taxpayer has conceded that if there is any pecuniary benefit, it would be taxable; the issue is as to the time when the assessment can be made.

Generally an option enables shares to be purchased at the prices ruling when the option is granted, so, if the taxpayer is right, there would be no liability to tax.

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[3] 1958 S.C. 177; 38 T.C. 12.

The meaning of "money's worth" was discussed in *Tennant* v. *Smith.*[4] One does not get money's worth until there is an opportunity of turning something to money.

In *Bridges* (*Inspector of Taxes*) v. *Hewitt*[5] the question of the time at which liability arose was discussed, but in that case it was held that there was no liability to tax, so that the observations were, admittedly, not part of the ratio; it is submitted, nevertheless, that they are a correct statement of the relevant principle. It is not in harmony with the statute or with common sense to claim, once it is shown that the case is within the schedule, that the liability can arise before the rights are capable of being realised and turned into money according to the tenor of the agreement made. The choice of the time to exercise the option may be left entirely to the employee; the opportunity and ability to reduce the right to money may be open to him at any time, but until he chooses to act, there is no liability. The option may never give him any benefit at all.

The benefit of the option is not brought home until the option is exercised. It is within the intendment of the schedule that, to be a perquisite capable of being turned to pecuniary account, it has to be saleable as such. The right arises out of the employment and could only be exercised if the taxpayer was, at the time of exercise, an employee. It therefore appertains to the employment as such. The contract had to be completed according to its tenor.

There is no ground on which the *Forbes* case[6] can be distinguished from the present case. Roxburgh J. distinguished it on the ground that the decision of the Court of Session turned on some peculiarity of Scottish law. There is no such peculiarity in fact. The decision was right and this court should follow it.

Heyworth Talbot Q.C. and *Desmond Miller* for the taxpayer. It is submitted that the following propositions are well founded: (1) If the holder of an office of profit receives a perquisite from that office, he is charged to tax in the year in which it is received according to its then money value. (2) No appreciation or depreciation in the value of a perquisite after its acquisition affects the taxpayer's liability, and this is true whether or not the appreciation or depreciation is obtained by conversion. (3) An advantage in order to constitute a perquisite in the taxpayer's hands must be in the form of money or money's worth. If it is not money, it must be capable of being turned to pecuniary account. The taxpayer here acquired for £20 an item of property. If the option was then worth £20 or less in the market, there is no ground for saying that the option was a perquisite. If the option was worth more than £20 when it was granted, the excess value is taxable. The question is, as Lord Watson stated it to be in *Tennant* v. *Smith*,[7] was the option something which could be turned to pecuniary account?

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[4] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158.

[5] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289.

[6] 1958 S.C. 177.

[LORD EVERSHED M.R. The court is troubled by the decision in the *Forbes* case.[8] If the ratio decidendi of that case applies here, it should be followed as a matter of comity.]

The point that the option, at the time when it was granted, was capable of being turned to pecuniary account does not appear to have been taken in the *Forbes* case.[8] The option there considered, like the option in the present case, was expressed not to be assignable. The option, however, was capable of equitable assignment. It was an item of property. The decision of the Court of Appeal in *Bridges* (*Inspector of Taxes*) v. *Bearsley*[9] is distinguishable.

There is no differentiating principle between this case and the *Forbes* case.[10] Nor are the facts distinguishable. In both cases the grantee of the option could have turned it to pecuniary account. But this court is not bound to follow a Scottish decision and should not do so if it comes to the conclusion that a relevant point that might have affected the decision was not taken in the Scottish case. There is such a point here. The fact that the taxpayer could have sold his equitable rights under the option and held them as trustee for the purchaser thenceforth and exercised them in accordance with his directions and on his behalf was not considered in the *Forbes* case.[10] The Scottish court appears not to have considered that the option was a proprietary right which could be turned to pecuniary profit. The Scottish decision was wrong. It was given per incuriam.

R. E. Borneman Q.C. in reply. This court should follow the *Forbes* case.[10]

LORD EVERSHED M.R. This appeal is concerned with the question whether the respondent in this court, Mr. Abbott, is, in respect of the tax year 1955–56, liable for a certain sum under Schedule E of the Income Tax Act, 1952. As may happen in these cases, Mr. Abbott was the appellant in the case stated; he is now the respondent and, for avoiding confusion, I shall refer to him as " the taxpayer," and to the other party as " the Crown."

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[7] [1892] A.C. 150, 159.

[8] 1958 S.C. 177.

[9] [1957] 1 W.L.R. 674.

[10] 1958 S.C. 177.

For the year of assessment in question the relevant statutory provisions are contained in the Income Tax Act, 1952. Section 156 of that Act imposed (under the heading " Schedule E ") a charge for tax in respect of every employment of profit and made applicable thereto the provisions of the Ninth Schedule to the Act. So far as relevant, that Schedule provides: " Tax under " Schedule E shall be annually charged on every person having " . . . an . . . employment of profit mentioned in Schedule E . . . " in respect of all salaries, fees, wages, perquisites or profits " whatsoever therefrom for the year of assessment," after making the deduction indicated.

In the course of the argument, both in this court and below, the subject-matter alleged to be taxable for the year I have named in the taxpayer's case has been called a " perquisite," and I will, as Roxburgh J. did, use that convenient description. But in order that a " perquisite therefrom," that is, from the employment, for the year of assessment should be taxable, it must have also an additional quality. That quality has been stated in the House of Lords by both Lord Halsbury L.C. and Lord Watson in the case of *Tennant* v. *Smith.*[1] Lord Halsbury L.C. said, in reference to the corresponding tax provision: " I come to the " conclusion that the Act refers to money payments made to the " person who receives them, though, of course, I do not deny " that if substantial things of money value were capable of " being turned into money they might for that purpose represent " money's worth and be therefore taxable." Lord Watson's language was not much different, and as it has been, perhaps, more often cited, I will read it. It is as follows[2]: " That word " —that is, " profits "—" in its ordinary acceptation appears to " me to denote something acquired which the acquirer becomes " possessed of, and can dispose of to his advantage—in other " words, money—or that which can be turned to pecuniary " account."

I can, therefore, restate the problem in this case as follows: it is whether during the year 1955–56 the taxpayer was rightly charged in his assessment in respect of what was for that year said to be a perquisite arising from his employment, being something which was capable of being turned to pecuniary account.

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[1] [1892] A.C. 150, 156; 8 T.L.R. 434; 3 T.C. 158, 164.

[2] [1892] A.C. 150, 159.

The advantage which he reaped in that year or, at any rate, put himself in a position to reap, had its origin 18 months further back, and a great deal of the argument, very rightly, has turned on this: assuming there was here a perquisite, whether that perquisite arose to the taxpayer not in the year in which he has been assessed but 18 months earlier when he acquired a right from which sprang the later advantage. That sufficiently, perhaps, introduces the necessary recital of facts.

The taxpayer is (at least, I assume he still is—he certainly at all material times was and had been for some time) the secretary of E. S. & A. Robinson Ltd. In the year 1954 the directors of that company came to the conclusion that it would be to the advantage of the company, and I daresay of those they employed in responsible positions, if they gave to them certain options to take up shares. There were available not less than 250,000 unissued shares in the company, and the scheme was that the taxpayer and other responsible officers should get options to take up at any time during the next 10 years, provided they remained in the service of the company, a certain number of those unissued shares which for the purpose were created ordinary shares. The number of shares any individual servant was entitled to have depended upon his status in the company. In the taxpayer's case the number of shares, if he wished to take them up, was 2,000.

I have used, and incorrectly used, the word "gave" when I earlier described the directors' scheme. In actual fact, the option offered to the taxpayer was offered for a pecuniary consideration, namely, £20, and we were informed that that figure represented £1 per 100 shares; and the corresponding sums paid, I assume, by other officers of the company were similarly calculated. If it were necessary to reach any precise conclusion upon the matter, it might be relevant to consider at some length the actual documents which came into existence and to arrive at a conclusion when the contract of option exactly was made, in what documents its terms were contained, and what was its date. The argument in this case has relieved me of any necessity of that kind. The relevant date for the purpose of the option contract may be taken as being October 7, 1954.

Owing to the necessity of obtaining Treasury sanction, there was delay before a certificate certifying that the taxpayer had this option could be given to him, but October 7 I take as the date, because that was the date of the form which the taxpayer signed accepting the suggestion of taking up this option contained

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in the company's letter of the previous day, and which he accompanied by sending £20 to the company. The letter of October 6 contained at some length the terms of the option, but for convenience I will refer to the terms and conditions as they appear on the back of the certificate when it was later issued. There were certain other qualifications, but for present purposes they can be ignored. The important condition or conditions are contained in the first clause in the terms: "The option is not transferable "and to the extent not previously exercised will expire upon the "holder's death or retirement, upon his service with the company "and/or its subsidiaries ending, or on the tenth anniversary of "the date of grant of the option, whichever first occurs."

The taxpayer took advantage of the company's suggestion. He paid £20 to the company, and from October 7 he became entitled to take up 2,000 of the unissued shares in Robinson's at any time within the period indicated in clause 1 endorsed on the certificate, and to do so at the market price at which those shares stood on October 7, 1954, which was 68s. 6d. The taxpayer did not immediately take up any shares, but in March, 1956, the shares having risen on the Bristol Stock Exchange to the market price of 82s., or 13s. 6d. above the option price, he took advantage of his rights. He filled in an application form in respect of 250 out of his 2,000, and he accompanied that application form by his cheque for £856 5s., which is 68s. 6d. multiplied by 250, and he had issued to him 250 of these shares worth then 82s. per share. It is that event which has brought down upon him the charge of the Inland Revenue, for it has been their case that, when the taxpayer exercised that contractual right under the option, and when, as a consequence, he obtained for £856 5s. a number of shares which were worth £1,025, he then, and in respect of that year, got from his employment a perquisite, as that word is expanded by Lord Halsbury L.C. and Lord Watson, a perquisite worth the difference between £856 5s. and £1,025, with a slight further deduction which was, rightly or wrongly, permitted in respect of a proportionate amount of the option price of £20. Put in simple terms, he was for his income tax liability for that year charged in respect of £166 as being the monetary value of the perquisite which was said and is said he in that year obtained.

Relating my original statement of the question to the facts—is the Crown's claim to tax the taxpayer under Schedule E in the sum of £166 justifiable or not justifiable in accordance with the relevant language of the Income Tax Act?

The facts of the case are, of course, fully narrated in the case stated, but I have thought it convenient and useful to make a short summary of them as a foundation to what immediately follows, for it seems to me right that I should at this stage briefly state what I conceive to be the nature of the rights in the eye of the law and their source both in October, 1954, when the taxpayer got his option, and in March, 1956, when he applied for and obtained his 250 shares. The option was a right founded in contract and, as Roxburgh J. observed, of a proprietary nature. It was a right which the taxpayer obtained, no doubt, because he was the secretary of the company. Subject to the conditions which were attached to its exercise, he became thereafter as a matter of right entitled, within the limit of time stipulated, to apply for any number up to 2,000 of this block of unissued shares, and to pay for them the price of 68s. 6d. at which they stood when the option came into existence. It is quite true that the option was expressed to be non-assignable, though there was no limitation upon what dealings the taxpayer might make with any shares which he acquired by virtue of the option. But though it was non-assignable, it was said, and said with some force, that nonetheless the option, when it was granted and immediately it was granted, was capable of being turned into money—turned to money account. What, if anything, the taxpayer might have obtained in any dealings that he entered into is a matter on which there is no evidence and might be purely speculative. I should assume, although again there is no evidence about it, that the grant of these options had an attraction to those to whom they were granted on the footing that there was, at any rate, a fair prospect that the shares in the Robinson company would appreciate in the future. As a matter of common sense, it was not likely that the taxpayer would pay £20, unless he had at any rate some hope that thereafter he would reap some reward. The legal rights in the option were not transferable. He could not transfer the right to apply to anybody else. But, as has been pointed out in the argument, and as is plain enough, the taxpayer might have been able to find someone who was prepared to pay to him some monetary consideration, on the terms that the taxpayer would thenceforth wholly or in part exercise the option as the third person required and when he required. To that extent, therefore, the option, if it had any inherent value, was capable of being turned to money account.

The grant of the option to the taxpayer no doubt depended upon the fact that he was, and was a reward for the fact that he

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was, secretary of the company; and so Mr. Heyworth Talbot has throughout conceded that the grant of this option did constitute a "perquisite" of the taxpayer's office; and if, but, of course, only if, the option was of a value when it was granted greater than the price the taxpayer paid, greater than £20, and if, as I am assuming, it could have been turned to money account one way or other for a sum in excess of £20, then, as Mr. Talbot concedes, the perquisite would have had the necessary quality to make it then assessable under Schedule E for income tax. But it was Mr. Heyworth Talbot's argument, on that footing, that no subsequent appreciation in the value of the option or of any rights that could be acquired by its exercise could thereafter constitute some other taxable subject-matter.

That brings me to the second question: what was the nature of the rights the taxpayer obtained in March, 1956, and whence were they derived? The former question is not, I think, difficult to answer. He obtained for £856 5s. the issue of shares worth £1,025. That advantage, that valuable asset, the taxpayer was able to obtain because he had by virtue of the contract of option a right to get it so long as he complied with the conditions and paid the 68s. 6d. per share. The company was bound to issue those shares, notwithstanding that their then present value was in excess of the price the taxpayer paid. Whence, then, did that benefit or advantage arise? Prima facie, as it seems to me, it arose because the taxpayer had an already existing contractual right to get it; but, no doubt, it is equally true to say, looking further back, that that contractual right was related to the origin in 1954 of its grant, namely, to the circumstance that the taxpayer was then and still remained secretary of the company.

That I conceive to be the nature of the rights which on those two dates the taxpayer obtained.

If Mr. Heyworth Talbot's submission is correct, then the perquisite once and for all was obtained by the taxpayer in October, 1954. Anything that happened after is irrelevant for tax considerations. On the other side, the argument of the Crown has been that the option, particularly having regard to its non-transferability, was something not capable of being called a perquisite, or at least not a perquisite within the meaning of Schedule E, in October, 1954; it was something incomplete and imperfect. But, the Crown says, when the option or to the extent to which the option, 18 months later was exercised, then, and then for the first time, the taxpayer did get in truth a perquisite which can and should be related to his employment as secretary, and it is on that footing that liability in the year 1955–56 was alleged.

The case, on the face of it, would appear not very difficult; the point may, at least, be simply stated; but quite properly we have had our attention drawn to certain cases, to the third of which, a Scottish case, I shall have to refer at greater length because, in the view I take, that case ought to be decisive in this court. But we were first of all referred to *Weight* v. *Salmon.*[3] I shall refer to it very briefly because it serves rather as illustration of the kind of point that arises than as any direct authority in the present case. The substance of the matter was this, that a certain company at an appropriate directors' meeting of each year, feeling a debt to those who managed its affairs, resolved that certain of its officers, if they liked to apply, should then be entitled to have allotted to them at par a certain number of shares in the company. The officers in many cases took advantage of that suggestion, applied for shares, had them allotted to them, and obtained, in the event shares, which were worth at the date of allotment considerably more than par value. It was there held that the officers did then get a perquisite, namely, the excess in value of the shares which they got attributable to and arising from their offices, and were taxable accordingly. I observe that in that case there was no grant of any precedent right. The offer is made, it is accepted, it all occurs within the scope of a short period and certainly within a single tax year.

A little more important but, again, as I think, not conclusive in the present case, is a case in this court of *Bridges* (*Inspector of Taxes*) v. *Bearsley.*[4] The facts of that case were somewhat unusual. The respondent, Bearsley, and another gentleman (for there were two cases tried at the same time) had been for many years managers or directors of a certain company, the control of which belonged to one Hornby. When Hornby died, he left his controlling shares in trust for his widow for life and thereafter to his two sons. There was no gift to either Bearsley or his colleague of shares, nor any grant to them of an opportunity of acquiring them. They obviously took the view—Bearsley and his colleague—that if they were going to continue to serve this company they wanted, at any rate, some proper security in the way of further shareholding, and the end of it all was that in December, 1945, the two Hornby sons entered into deeds of covenant with

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[3] (1935) 51 T.L.R. 333; 19 T.C. 174.

[4] [1957] 1 W.L.R. 674; [1957] 2 All E.R. 281; 37 T.C. 289.

Bearsley and his colleague. The arrangement, as recorded in the deeds (and it was somewhat loosely framed), was that if Bearsley and his colleague continued to serve the company for another four years, then, at a short interval after the death of Mrs. Hornby, the two Hornby sons would transfer free of any consideration to Bearsley and his colleague certain shares. Time passed, because Mrs. Hornby lived to a considerable age; and eventually, before in fact she died, and to that extent in advance of any covenanted obligation, the two Messrs. Hornby did transfer to Bearsley and his colleague the requisite shares. A charge was made against both Bearsley and his colleague on the footing that the value of the shares, which they had got for nothing, should be taxed as perquisites of their offices as directors for the year when they received them. It was claimed, among other things on their behalf, that that was the wrong approach, that one should look to the date of the covenant, and if they were chargeable at all Bearsley and his colleague should be charged at that date, for it was from that covenant that sprang the later transfers.

I have dealt a little at length with the facts, because much reliance has been placed upon the way in which Danckwerts J. at first instance, and Jenkins and Sellers L.JJ. in this court, dealt with the point I have last mentioned. It was Danckwerts J.'s view that these gentlemen were taxable under the Schedule for the year in which the transfers were made and in respect of the value of the shares. As regards the suggested alternative basis of taxation, namely, that they should be charged, if at all, at the date when the covenants were entered into, Danckwerts J., as I understand him, said in effect[5]: " No, the covenants were really " a promise that if they served four more years at £X, then at " the end of that period, and as additional remuneration for the " next period, they would get this added benefit," as though, to take a simple example, you are employed at £1,000 a year for four years and £6,000 for the fifth year.

This court by a majority, Jenkins L.J. dissenting, decided that Bearsley and his colleague were not taxable at all, on the ground that one could not really relate these gift shares to the contract of service. In truth, it was nothing other than generous bounty on the part of the two Hornby sons, and as such not liable to income tax assessment. But Jenkins L.J. affirmed the view which Danckwerts J. had taken in regard to the alternative suggested assessment, namely, an assessment at the time of and on the basis of the value then existing, if any, of the deeds of covenant in December, 1945. He followed Danckwerts J. in thinking that the deeds constituted merely a promise of future additional remuneration, and one could not treat the covenants themselves as a distinct item, a separate perquisite capable of being turned to pecuniary account and taxable as such in the year 1945–46. Sellers L.J. dealt with it more briefly by the phrase[6]: "It is not, in my view, in harmony with the tax "provisions that if the transactions fell within the terms of "Schedule E the income was the value of the rights acquired by "the appellants when the deeds were entered into," and he, too, expresses concurrence with Danckwerts J. The third member of the court, Morris L.J., was silent upon this point.

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[5] 37 T.C. 289, 305, 306.

That case, upon those facts, is plainly different in many ways from the present. This is admittedly not a case merely of bounty. The option is a contractual proprietary right, which was obtained in 1954. It was not a mere promise of future remuneration, as were the deeds in *Bearsley's* case[7] in 1945. But the idea of future additional remuneration is one that emerges in Roxburgh J.'s judgment in the present case, when he deals with the third and most important of the three cases, namely, the Scottish case of *Forbes' Executors* v. *Inland Revenue Commissioners*.[8] I have already indicated that my view is that we should, in this court, follow the decision in *Forbes'* case,[8] and Mr. Heyworth Talbot conceded in his argument before us that, on the essential facts, this case is not distinguishable from *Forbes'* case.[8]

That being so, I shall not deal at too great length with the facts in *Forbes'* case.[8] It is sufficient to say that, as in the present case, there was first granted an option, and then at a later date the option was exercised. As in this case, the question arose, was the grantee of the option liable to be charged in respect of a previous year for the value of the shares which the taxpayer had got when he had exercised the option? The option again is in essential respects similar to that in the present case. It was limited in time, it was subject to the taxpayer continuing as a director of the named companies, it was non-transferable. One distinction may be made, a distinction to which Roxburgh J., I think, attached importance, but to which (if I may say so, rightly) Mr. Heyworth Talbot did not himself attach significance. In the present case the taxpayer paid £20 for his option. In the

[6] [1957] 1 W.L.R. 674, 703.

[7] [1957] 1 W.L.R. 674.

[8] 1958 S.C. 177; 38 T.C. 12.

case of *Forbes*[8] the taxpayer paid nothing. There is, perhaps, just this further point to be made, though for present purposes I conceive it to be irrelevant: in the taxpayer's case there was no sort of limitation or restriction on what he might choose to do with any shares he took out. It was, I assume, contemplated that if, as has happened, they increased in value, he might wish to realise the profit. There was no restriction in terms in *Forbes'* case,[8] but as the general purpose of the transaction was in order to enable Forbes to acquire a share control, it was obviously not in fact contemplated that he, Forbes, would sell, or would, at any rate, sell to any appreciable extent. In considering the rights and the legal consequences, I cannot think that that matter is relevant, and it has not been suggested in argument that it is.

Those being the essential facts, indistinguishable from those in the present case, what was the conclusion of the Scottish court? The conclusion was twofold. The Court of Session held that, because of the restrictions on dealing with the option, its non-transferability and so forth, the option when granted to Forbes did not fall within the scope of Schedule E, because it had not the necessary quality expressed in the passages from Lord Halsbury L.C.'s speech and Lord Watson's speech[9] that it could be turned to pecuniary account. Having arrived at that conclusion, the opinion of the Lord President (Clyde) proceeded as follows[10]: "From this it would follow that it "is only in 1946, when Mr. Forbes applied for allotment, "paid the par value and received shares which he could "have sold at a profit in the market, that tax under the Rule "becomes exigible." He then deals with a suggestion that it was at the date of the option that the legal right had vested in Forbes in respect of which, if at all, he was liable to assessment. "The argument for the appellants was that in 1944 a "legally enforceable right had vested in Mr. Forbes when he "signed the agreement, which he could have converted into cash "forthwith by securing an allotment of shares which he could "sell in the market." As to that, he says there are two fallacies. "In the first place, the right which Mr. Forbes got under the "agreement was not a right to shares which sounded in money "but a mere right to apply for shares which he never exercised "that year and which in itself had no market value at all. But "in the second place the right which he obtained under the

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[8] 1958 S.C. 177.

[9] [1892] A.C. 150, 156, 159.

[10] 1958 S.C. 177, 184.

"agreement was not an unconditional one. He could not "effectively exercise it unless he complied with its conditions, "one of which was the payment to the companies of the par "value of the shares applied for. These two considerations "appear to me to point necessarily to the year 1946 when the "right was effectively exercised, as the year in which the profit "accrued."

I need not read further passages, perhaps to refer briefly to an earlier part of the Lord President's opinion where he says,[11] among other things: "Moreover—and this appears to "me to be fatal to the appellants' contention—there was no "pecuniary value in the mere right which he got by virtue of "the agreement. For it was not a right to any shares and "could not be disposed of nor sold by him."

The opinions of Lord Carmont and Lord Russell were to the same effect. I read only a passage from Lord Russell.[12] He states the appellants' contention and says: "In my opinion, "whatever may be the rights vested in the holder of an option "in the abstract, it is essential to have regard to the nature "and the quality of the right created in Mr. Forbes' favour "in 1944. As previously stated, that right was personal and "unassignable and was qualified by the condition that he must "render cash in payment, while still remaining managing "director, before being in a position to enforce compliance by "the companies with their conditional obligation to allot. It "appears to me that the latter contingency coupled with the "personal and unassignable nature of the right prevents it from "being something which could be 'turned to pecuniary "'account'"—words which appear in quotes and which are, of course, taken from Lord Watson's formula—"unless and until "the right was exercised and the condition purified." It follows, therefore, that in *Forbes* [13] the Scottish Court of Session decided two things: They first decided that an option, having the essential characteristics of the taxpayer's option, had not itself the necessary quality at the date of its grant to make it a perquisite within Schedule E liable to tax. They went on to hold, and from the language of Lord President Clyde it may be said that they held as a consequence, that the option-holder was liable to be charged for the profit, the gain, the advantage he got, when he turned to account, as he did, this option by getting by its exercise something worth a good deal more than he paid.

[11] 1958 S.C. 177, 183.

[12] Ibid. 186.

[13] 1958 S.C. 177.

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The basis of that reasoning has been severely and, if I may say so, by no means ineffectively impugned both in the court below and in this court. It is said that the Scottish judges took altogether too narrow a view of the nature of the rights which the option gave to Forbes. More particularly it is said that the judges omitted to notice the fact (obvious enough, as Mr. Heyworth Talbot said) that the holder of such an option could turn it to account, not by assigning the option itself (which he could not do) but by covenanting for a money consideration that he would exercise the option in a particular way and at a particular time as the covenantee required, and that, had that fact been present to the judges' minds, they might well have concluded differently on the first point, and, if so, the second point would have fallen down. Mr. Heyworth Talbot has obtained for us copies of the report of the case in the Session Cases, and the argument of the appellants before the Inner House certainly does not make it plain that the point was taken by the appellants that Forbes could have turned to money account his option, albeit it was non-transferable. But, for my part, I think it difficult to say that the terms of the report of the argument are such as to exclude that argument, nor do I think really in the end of all it greatly matters. Apart from that form of transaction, it is quite plain—and I cannot think that the Lords of Session could have failed to observe it—that the option-holder could have sold the shares before and not after he had exercised the option. But the fact is that the Inner House, in the clearest terms, have decided that an option in terms in all material respects identical with the taxpayer's option cannot be at the date of its grant brought into charge under Schedule E.

I am conscious, having attended to the arguments, of the difficulties which seem to me to present themselves upon that view of it. With the emphasis laid, as the Scottish judges laid it, on the point of non-transferability, one may ask what would be the right answer if an option of this kind were granted which was transferable. Mr. Borneman, not unnaturally, was unwilling to commit himself to what would happen if such a case arose for consideration. But if the truth is that an option, which was assignable, would attract tax at the date of its grant (assuming that it had a bonus value which was calculable), then it would seem to follow, as the night the day, that the Crown could not afterwards seek to tax the benefit or the further gain which was achieved by the exercise of the option, and one would get a somewhat strange anomaly where the option was expressed to be assignable and where the option was expressed to be non-assignable. Other somewhat similar cases might arise. Supposing, for example, a man acquires an option of this kind at a price in the market, being, if you like, a servant of the company, but acquiring it in the ordinary course of commercial dealing. Nobody could then suggest, of course, that he was taxable at all, either in respect of any value of the option when he bought it or, still less (at any rate, as things now are), in respect of any capital gain which he got on the exercise of it wholly or partly thereafter; and, as Mr. Heyworth Talbot pointed out, what in its essence is the difference? Here the taxpayer got for £20 a right, and he later exercised that right and obtained a valuable asset. The answer, right or wrong, of course, is that in the taxpayer's case he only got the right because, being one of the valued servants of the company, the directors resolved that he should have it, and he would not otherwise have got it. But that still leaves unanswered the problem that if in truth it could be turned to pecuniary account and if so turned it was worth more than £20, then one should assess him in respect of the perquisite. If at that time it could not be turned to pecuniary account at more than £20, then that is the end of it, because thereafter it is merely a matter of capital gain.

My difficulties, I confess, do not end there, for I am troubled, with all possible respect to the Scottish judges, by the line of reasoning which seems inherent in the passage I have read from the Lord President's opinion, that because the option, when granted, could not be turned to money account and for that reason is not taxable, therefore[14] "it would follow that it is only in "1946, when Mr. Forbes applied for allotment . . . that tax "under the rules becomes exigible." With all respect, I am not, I confess, satisfied of the logic of that statement. It may be—and I so put it because the Scottish court has so held—that when the taxpayer got his advantage in 1956 it ought to be treated as attributable to something granted to him qua servant and therefore treated as a perquisite. But I find difficulty in thinking that the liability arises because the option, when granted, could not be turned then to pecuniary account. I also ask myself the question upon the footing of the Crown's case, what is it for which the taxpayer is being taxed? According to the case stated, there is included in his assessment the sum of £166 in respect of the share transaction, such sum being made up as

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[14] 1958 S.C. 177, 184.

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follows: 250 shares taken up on March 28 when the actual market price was 82s., £1,025. Deduct option price, so much, net £166. The alleged perquisite, therefore, appears ex facie to be a share transaction entered into in March, 1956. The perquisite, in other words, is the gain represented by the fact that the taxpayer then got for £859 shares worth £1,025, and gained the balance of £166. I have said, and it is no doubt true to say, that the taxpayer's advantage which he got in 1956 was attributable, in a fair sense of words, to the fact that, having been a faithful servant, he had in October, 1954, been given an option contract which entitled him to do what he did, and to get the advantage he got in 1956. But I find nowhere in any contract or elsewhere any provision that (as a perquisite for that year) the taxpayer was entitled to get £166 or the difference between the value of any specified number of shares at their then market price of 82s. and the option price of 68s. 6d.

Those are my doubts, and, if my doubts are well founded, they reinforce, at any rate, the view that what the taxpayer got in 1956 was a valuable piece of property, which he got because then he had, and had had for 18 months, an absolute contractual right to get it—qualified, no doubt, to the extent that he had still to be a servant of the company in order to enjoy it, but still attributable to a legal right granted to him 18 months earlier.

I have mentioned these doubts because I have thought that, if this matter were to go further, it might be of some assistance if I were to state them. I have also mentioned them because it is now right that I should say something about the judgment of Roxburgh J. The judge, in the end, came to the conclusion that the taxpayer was not taxable in respect of this year 1955–56 for this sum of £166. He came to that conclusion, as I follow it, because, and largely because, he, the taxpayer, had paid £20 for the option contract. I will read a passage from the judgment. After referring to Lord Russell's opinion and saying that he cannot accept as a proposition in English law what Lord Russell formulated, he said [15]: "My view of the benefit of this "option contract is that it is not to be assimilated and is not "additional remuneration. It is a chose in action which the "employee was enabled to purchase, because of his employment, "on beneficial terms, and that is why it is a perquisite. None "the less, it is not in any sense remuneration for his services.

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[15] [1959] 1 W.L.R. 667, 682; [1959] 2 All E.R. 270.

"I have never heard of any employee having to pay for his own "remuneration, and that is why I think this £20 is so important. "It is not the amount, it is the effect. That feature is absent "from every case which has hitherto been decided on this topic. "The option contract might have been a dead loss, the opposite "of additional remuneration. The figure here was £20 and the "shares went up. Therefore, of course, it did enable a profit to be "made. However, the shares might have gone down until the "company went into liquidation, and then the £20 which had been "spent, so far from being additional remuneration, would have "been a dead loss. In my view, it was a perquisite, and it was "a perquisite which could be turned to pecuniary account."

What that, if I have followed it correctly, led to was this, that the judge thought that when the option was granted (and in this he followed Mr. Heyworth Talbot's argument) then there was a perquisite granted to the taxpayer, but, seeing that he had paid £20 for it, and that there was no evidence that it was worth more, and it had never been turned to account for anything more at that date, it had therefore attracted no tax, and that was then the end of it. So far as what later occurred, the benefit of the shares, that, Roxburgh J. said, cannot be regarded as additional remuneration, as Danckwerts J. and Jenkins L.J. thought in *Bridges (Inspector of Taxes)* v. *Bearsley*,[16] because the taxpayer paid £20 for what he got, or for the source of what he got, and, as Roxburgh J. said, he might have paid £20,000 for it. At any rate, having paid for it, it cannot be treated as additional remuneration.

The consequence, or one particular consequence, was that in the judge's opinion the *Forbes* case[17] was rightly decided but on the wrong grounds, or, at any rate, on grounds which he, as an English judge, could not accept. He, Roxburgh J., took the view that Forbes or his executors were liable to the tax they were charged because in his case, he having paid nothing for the option, it was a matter merely of additional, albeit postponed, remuneration, as was suggested in the *Bearsley* case.[18] He said he would have so decided *Forbes*[19] himself had the matter come before him in England. But he felt that the grounds upon which the Lord President, Lord Carmont and Lord Russell decided it, though they might well be good grounds in Scots law, were not sustainable in English law.

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[16] [1957] 1 W.L.R. 674.

[17] 1958 S.C. 177.

[18] [1957] 1 W.L.R. 674.

[19] 1958 S.C. 177.

As to that I am bound to say, with all respect to Roxburgh J., that I cannot agree that the *Forbes* case could be supported on the ground that the shares when issued were additional remuneration comparable to the additional remuneration suggested to have been promised and granted in, for example, the *Bearsley* case.[20] I am unable to agree with that. I think that what Forbes got was not additional remuneration which had been promised, but something which he became entitled to get as a result of a valid and effective right, namely, the option. But I am also, with all respect, unable to agree with Roxburgh J. that the judges in Scotland applied propositions of Scots law which have no application in England and which, therefore, leave us to decide this case without regard to the *Forbes* decision.[21] I cannot see that there are any propositions of Scots law which form the basis of the decision and which are distinct from anything which we have to apply here. The question before the Scottish court was the same as the question before us: Was the sum of money for which Forbes was charged and for which here the taxpayer is charged representing the value of what he got, was that a perquisite within the meaning of the Schedule E provision; and as a prelude to that question, was the option granted to Forbes, as the option granted to the taxpayer, a perquisite liable to be charged within the meaning of the Schedule E provision? The Scottish court purported to answer this latter question by applying the test which had been laid down in the House of Lords by Lord Halsbury L.C. and Lord Watson. There was nothing esoteric in the bargains made. They were straightforward commercial bargains. That being their nature, it seems to me incontrovertible that what the Scottish court decided was that an option, in all relevant respects the same as the taxpayer's option, cannot be turned to pecuniary account at the date of its grant and, therefore, whether or not it might otherwise be a perquisite, cannot be taxed at that date and in respect of that year, the year of its grant, under Schedule E.

They further decided, whether consequentially or not, that when the rights given were exercised and brought, so to speak, to fruition, or to the extent that they were exercised and brought to fruition, then and in that year there did arise a perquisite which was capable of being turned to pecuniary account in the year when the exercise was made.

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[20] [1957] 1 W.L.R. 674.

[21] 1958 S.C. 177.

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Those two things the Scottish court has, I think, plainly decided. I ask myself, therefore, having expressed such doubts as I have, with all respect to the judges in Scotland, ought this court now to answer those two questions in a precisely opposite sense? It is, of course, quite true that we in this court are not bound to follow the decisions of the Court of Session, but the Income Tax Act and the relevant Finance Acts apply indifferently both north and south of the border, and if we were to decide those questions in a sense diametrically opposite to the sense which appealed to the Scottish judges, we should lay down a law for England in respect of this not unimportant matter which would be completely opposite to the law which was applied, on exactly the same statutory provisions, north of the border. I cannot think that that is right. In a case of a revenue statute of this kind it is the duty of this court, unless there are compelling reasons to the contrary, to say, expressing such doubts as we feel we ought to do, that we should follow the Scottish decision.

Mr. Heyworth Talbot put forward an argument that we could treat the case as having been decided per incuriam mainly, if not entirely, on the ground that it was never brought to the attention of the Scottish judges that, after all, this option, if it was worth anything, could have been turned to pecuniary account by the simple device of the option-holder's saying to whoever was interested: "For a consideration of £X I will exercise this option "as and when you require and on your behalf." But I have not been satisfied that we could or should properly dissent and depart from the Scottish decision on that ground.

It comes, therefore, in the end to this: we ought to treat the Scottish case as governing our decision, and taking that view and disagreeing, with all respect, with Roxburgh J.'s view that the Scottish decision depended upon some special peculiarities of Scots law, I would allow the appeal.

Sellers L.J. I agree, for the reasons which my Lord has just given, that *Forbes' Executors* v. *Inland Revenue Commissioners* [22] ought to be held by us to be decisive of the point raised before us in this present case. The question there for decision, in the words of Lord Russell in the course of his judgment, was "whether that perquisite accrued to and was acquired "by Mr. Forbes at the date of the agreement, viz., September, "1944, or whether it accrued to and was acquired by him only

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[22] 1958 S.C. 177, 186.

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" when—and not before—he exercised his right and received an " allotment of the shares in 1946." The issue in that case seems to me to be indistinguishable from the issue in this case, and the relevant and material facts likewise have no different effect.

Secondly, with respect to Roxburgh J., it seems to me that it is not shown that there is any difference in the law which the Inner Court of Session invoked to decide that case from the law of our own country.

Thirdly, the case was argued on all the points which were taken here and it would appear were all in the mind of the court.

In these circumstances, I feel that we ought to accept that decision and follow it, and I may say that I do so with more satisfaction perhaps than my Lord because I take a more favourable view of the decision at which that court arrived and do not share, at any rate not with the same emphasis, many of the doubts which my Lord has expressed. I do not wish to speak with finality because I apprehend that, having regard to the impact of this case, the *Forbes' Executors* case,[23] upon our decision, we discouraged Mr. Heyworth Talbot from pursuing the whole of his argument, but, as far as it had gone, I have not been persuaded that the judgments in that case were wrong. Indeed, as at present advised, agreeing with the judgments as a whole, I might particularly say I should have been prepared to follow the way in which the matter is put by Lord Russell.[24] If the option was never exercised it seems axiomatic that there would be no profit and no accrued benefit. The contractual right given by the company, and it was by the company to the servant, the taxpayer, in this case could not be transferred, and the view I should be inclined to take of the case, which, I think, is in harmony with the *Forbes' Executors* case,[25] is that that merely set up the machinery for creating a benefit—that was its intention—which benefit ultimately accrued. It is an ingenious device to avoid the incidence of taxation. In my view it does not achieve it, or, at any rate, it is doubtful whether it has achieved it.

On the date of the option there was no money payment which was a gain. The £20 paid by the taxpayer was an expenditure. A notional use of the option or a use unintended and undesired by the company, unrealised and unvalued, does not seem to me to have the quality required by the accepted standard set by Lord

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[23] 1958 S.C. 177.

[24] Ibid. 186.

[25] 1958 S.C. 177.

Halsbury L.C. and Lord Watson, already quoted by my Lord, to make it a taxable perquisite, if, indeed, it was a perquisite at all at that date.

Not only have we the authority of the *Forbes' Executors* v. *Inland Revenue Commissioners* case, but the observations in this court of Jenkins L.J.[26] agreeing with Danckwerts J., as I did myself, I believe, have been rightly assessed in the *Forbes* case by the Lord President when he says [27]: "These observations . . . "confirm the conclusion to which I have come in the present "case," or in the words of Lord Russell: "Those opinions are "clearly adverse to the appellants' submission in this case." It may be said in the particular circumstances that they were obiter dicta, but, in effect, I think they support the point on behalf of the Crown in their argument in this case.

For those reasons, and without going into the matter in greater detail, I agree that this appeal should be allowed on the basis of the decision of *Forbes' Executors* v. *Inland Revenue Commissioners*.

HARMAN L.J. I agree in the result which my brothers have announced. I confess to sharing the doubt expressed with such circumspection, if I may say so, by the Master of the Rolls. The Lords of Session decided *Forbes'* case, as I see it, on a construction they put upon the option document there existing. No doubt that option, like the option in the instant case, was hedged about by a number of conditions; but I cannot see that the number of the conditions alters the nature of the right, nor understand why some options appear to their Lordships to come within Lord Watson's formula and others not. They all seem to me to be rights of property more or less valuable according as the conditions are more or less onerous. The Crown's contention here and the decision of the Lords of Session ignore altogether the option and treat the case as being in line with *Weight* v. *Salmon*,[28] already mentioned by my Lord. where there was no antecedent agreement at all (see the observations of Lord Atkin). I find this hard to accept. On the other hand, I cannot justify to my mind Roxburgh J.'s suggestion that the Lords of Session decided *Forbes'* case [29] on some unknown principle peculiar to Scottish jurisprudence. That court, as I see it, construed a document of option

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[26] [1957] 1 W.L.R. 674.

[27] 1958 S.C. 177, 185, 189.

[28] (1935) 51 T.L.R. 333; 19 T.C. 174, 193.

[29] 1958 S.C. 177.

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indistinguishable from that in the instant case and, therefore, for reasons of policy it would not be right that this court should express a diametrically opposite view.

Appeal allowed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Allen & Overy; Solicitor of Inland Revenue.*

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Oct. 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23; *Dec.* 8.

Jenkins, Romer and Willmer L.JJ.

In re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES LTD.

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged—Whether proper law of contract or lex situs of debt applicable.

Conflict of Laws—Chose in action or debt—Discharge.

Conflict of Laws — Contract — Proper law — Lease of movables — Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.

Currency—Contract—Foreign debt—Conversion into sterling—Date for conversion.

Conflict of Laws — Contract — Renvoi — Applicability of doctrine to contract.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. In 1921 it bought rolling stock worth $14,000,000 and decided to raise part of that sum in the United States of America under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the United States a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee the rolling stock for a period of 15 years for a rental payable twice yearly at the office of the trust company in Philadelphia. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the lease forming security for those payments.

By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated

April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain decrees enacted for the purpose, acquired the management and control of the U. Company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the U. Company from all responsibility in respect of liabilities arising under the trust certificates. On March 4, 1954, the U. Company went into voluntary liquidation and the successors of the trust company as trustee for the certificate holders lodged a proof, claiming the instalments that were payable under the lease. On appeal from the liquidators' rejection of the proof:—

Held, (1) that, on the evidence of Cuban law, the sale to the Cuban State of the undertaking left wholly unaffected the rights of the creditors against the company.

Per curiam. Novation of a contract comprises two features: the discharge of the debtor and the substitution of a new debtor; the discharge is controlled by the proper law of the contract. Further, rule 155 in Dicey's Conflict of Laws, 7th ed., p. 804, that "The "validity of the discharge of a contract (otherwise than by bank-"ruptcy) normally depends upon the proper law of the contract ". . ." applies to a debt which has accrued due under a contract equally with a contractual obligation to make a payment in futuro.

Antony Gibbs & Sons v. *La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399; 6 T.L.R. 393 applied.

Arab Bank Ltd. v. *Barclays Bank* (*Dominion, Colonial and Overseas*) [1954] A.C. 495; [1954] 2 W.L.R. 1022; [1954] 2 All E.R. 226 distinguished.

(2) (Willmer L.J. dissenting), that the proper law of the lease and the contemporaneous agreement was that of Pennsylvania; that since, according to the law of Pennsylvania, the obligations of the U. Company under the lease were continuing, the trust company could prove in the liquidation for a sum in respect of principal, premium and interest due sufficient to satisfy the proper claims of the certificate holders, such sum, in dollars to be converted into sterling at the rate of exchange prevailing at the date of the winding up.

Per Willmer L.J. The proper law of the lease and the contemporaneous agreement was Cuban. In the circumstances, however, this did not prevent the trust company from proving in the liquidation for a sum in respect of principal, premium and interest due. But such sum, in dollars, was to be converted into sterling at the rates of exchange prevailing at the respective dates at which the instalments comprised in it fell due.

Per curiam: Even if Cuban law were to be regarded as the proper law of the contract, their Lordships were disposed to hold that such law would be the domestic law of Cuba, and not Cuban private international law.

Semble: that the doctrine of renvoi has no application in the field of contract.

Decision of Wynn-Parry J. [1958] Ch. 724; [1958] 2 W.L.R. 229; [1957] 3 All E.R. 641 affirmed.

APPEAL from Wynn-Parry J.

The facts are taken substantially from the judgment of Wynn-Parry J.

United Railways of the Havana and Regla Warehouses Ltd. (hereinafter referred to as "the company,"), was incorporated in England on August 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connection therewith. Prior to and during 1921 the company purchased rolling stock, consisting of locomotives and cars, to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. What was done was this. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Co. (hereinafter referred to as "the car company"). The car company was a subsidiary of the company. It was the use of this company in the manner hereinafter to be described, which constituted the variation from or addition to the Philadelphia Plan. On March 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated April 11, 1921, which was described as a bill of sale, before a notary public in New York. On April 18, 1921, a document, described therein as a lease and agreement (hereinafter referred to as "the lease"), was executed between the car company as lessor and the company as lessee. The lease was executed in New York before a notary public by attorneys in fact for the car company and the company respectively. The attorney in fact for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on February 3, 1921.

The recitals to the lease, so far as material, read as follows: "Whereas, the lessee has power under its charter and the laws "of the Republic of Cuba and the Acts of the United Kingdom "of Great Britain and Ireland to enter into and perform this "agreement, and has taken all necessary corporate action to "authorize the execution and delivery hereof. And whereas, "at the time of the execution hereof the lessor holds contracts "for the construction and acquisition of, or is the absolute owner "of, the railroad equipment and/or rolling stock hereinafter "described, and has agreed to deliver forthwith or as soon as the "same shall be completed, such railroad equipment and/or "rolling stock to the lessee, which agrees to receive the same, "such delivery by the lessor and acceptance hereof by the lessee "to be upon the terms and under the conditions herein set forth: "And whereas, the lessor desires, upon the execution hereof, and "in the manner hereinafter set forth, to assign, transfer and set "over to the Commercial Trust Company of Philadelphia, as trustee all the lessor's right, title and interest in and to this "lease and the rents reserved hereunder, and in and to the railroad equipment and/or rolling stock hereby demised. And "whereas the lessee, in consideration of certain rights given to "it to pay rentals in United Railways of Havana 15-year 7½ per "cent. Equipment Trust certificates, and within six months after "certain payments of rental to tender additional certificates and "receive cash in exchange therefor, all as hereinafter specifically "set forth, consents to said contemplated assignment."

Then the lease witnessed: "That for and in consideration of "the sum of one dollar ($1) paid by the lessee to the lessor, as "well as of the rentals and covenants hereinafter mentioned, the "lessor has let and leased and by these presents does let and "lease to the lessee, for the term of fifteen years from the "fifteenth day of February, 1921, unless sooner terminated as "hereinafter provided, the following described railroad equipment "and/or rolling stock, to wit . . ."; and there followed a detailed list of the rolling stock. It was then provided that the rolling stock was leased "at and for the rental hereinafter set out, and "upon the terms, conditions, and covenants following, to wit:

"First. The lessee shall and will pay to the lessor or its "assigns at the office of Commercial Trust Company, hereinafter "called 'the trustee,' in the City of Philadelphia, Pennsylvania, "or at the office of Central Union Trust Company of New York, "in the City of New York when payment in New York is hereinafter specifically required, as rental for the said railroad

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"equipment and/or rolling stock without deduction for any taxes, "duties, charges or assessments, which the lessee may be required "to pay or withhold under the laws of the United States of "America or of any other country": This made clear that the primary place of payment was Philadelphia. New York was only used for the payment of interest, as emerged from the provisions of paragraph I (a), which followed, and which, so far as material, read as follows:

"I. Half-yearly on the fourteenth day of February, and on "the fourteenth day of August in each year, the first payment to "be made on August 14, 1921. (a) A sum payable in New York "equal to 3¾ per cent. of the par value of certain certificates not "exceeding $6,000,000 issued under an agreement bearing even "date herewith between Cuban Rolling Stock Company, and "Commercial Trust Co., trustee, and outstanding and unpaid "on the fourteenth day of February and the fourteenth "day of August, respectively in each year, during the term of "this lease, and an amount equal to the accrued dividends on the "certificates purchased by the trustee during the preceding six "months under the provisions of the said agreement; less such "sums derived from investments by the trustee of undistributed "rentals in its hands, as reported from time to time by it to the "lessee as applicable to the payment of dividend warrants on "the aforesaid certificates."

Sub-paragraphs (b) and (c) dealt with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which were to be paid by the company and would be payable in Philadelphia. By paragraph II provision was made for bi-annual payments on August 14 and February 14 in each year covering the period from August 14, 1921, to February 14, 1936, of sums which were treated as rentals. The payments of interest under paragraph I (a) and the bi-annual payments under paragraph II were calculated to cover the interest and capital and premium payable in respect of the certificates referred to in paragraph I (a). It was then provided that all the bi-annual payments mentioned in paragraph II were to be made in gold coin of the United States of America of the 1921 standard of weight and fineness; and there followed a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of clause first allowed the company to pay on any rental day a lump sum sufficient to "enable the trustee to call for retirement and to "retire on the dividend date next ensuing all outstanding United

"Railways of Havana 15-year 7½ per cent. Equipment Trust "certificates by the payment of the par value thereof and a "premium of 10 per cent. thereon and accrued dividends thereon "to the date of retirement." This provision served to emphasise that the payments under the lease were designed to provide the principal and interest reserved by the certificates, the lease forming the security for those payments.

Clause second provided that all the rolling stock and replacements, the subject of the lease, were "to be plainly marked and "kept marked on both sides thereof with the words: 'Commer- "'cial Trust Company, Trustee, Phila., Pa., Owner and Lessor, "'U. H. Equipt. Trust No. . . .'." Clause fourth required the company "to keep the said railroad equipment and/or rolling "stock insured in some incorporated insurance company or com- "panies of good standing, organised under the laws of the "United States of America or of the United Kingdom of Great "Britain and Ireland, to be approved by the trustee, assignee of "the lessor. . . ." Clause fifth, so far as material, read as follows: "The lessee further covenants that there shall be no "assignment or transfer of its rights or interest in said railroad "equipment and/or rolling stock under this lease, or any under- "letting of said leased property, without the consent of the "lessor and its assigns endorsed hereon." Clause sixth provided that in case of default in the payment of any of the rentals, the car company might declare the lease terminated and might take possession of the rolling stock. Clause seventh provided that in that event the lessee was to move the rolling stock to such points on the railroad as the lessor or its assigns should designate and deliver up the same, "and it is hereby expressly covenanted "between the lessor and the lessee that performance of this "covenant as herein set forth is of the essence of the contract "between the parties and that upon application to any court "having jurisdiction in the premises the said lessor, its successors "or assigns, shall be entitled to a decree against the lessee "requiring specific performance hereof." Clause eighth was of importance, and, so far as material, read as follows: "It is "understood and agreed by and between the lessor and the lessee, "that the lessor may forthwith, upon the execution hereof, "assign, transfer, and set over unto Commercial Trust Company, "of Philadelphia, as trustee, all the lessor's right, title, and "interest in and to said railroad equipment and/or rolling stock "hereby leased unto the lessee, and as well all of the lessor's "claims, demands, and remedies, under this lease accruing or to

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"accrue . . . and that when it, the lessee, shall have fully paid "all the rents, which it has herein covenanted to pay, the said "railroad equipment and/or rolling stock may be re-assigned by "said Commercial Trust Company, of Philadelphia, trustee, to "the lessor, and upon such re-assignment and the expiration of "the term of this lease, all said railroad equipment and/or rolling "stock shall revert to the lessor." Clauses eleventh and twelfth were also important and were as follows:

"Eleventh. It is the intention of the parties to this lease "to enter into and execute this lease in accordance with the "provisions of the laws of the Republic of Cuba to the end that "this lease may be deposited or filed and/or registered there-"under, and the railway company agrees to so deposit and/or "register or file the same, and to record the same in such State "or territories of the United States as may be required by law, "and to perform any other act required by law that may be "necessary to protect the trustee's title. In case it becomes "necessary that this lease be translated into the Spanish "language in order that it may be filed and/or registered in the "proper offices in the Republic of Cuba, then and in that event "it is understood and agreed that the English text shall govern "in case of any conflict between the English and Spanish texts.

"Twelfth. The parties hereto submit themselves to the juris-"diction of the tribunals of the City of Havana, in the Republic "of Cuba, for all notifications, summonses and other judicial or "extra judicial formalities to which this lease shall give rise, with "express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement (hereinafter referred to as "the trust agreement") between the car company and Commercial Trust Co., of Philadelphia, a corporation of the Commonwealth of Pennsylvania, to which, and to whose successors as such trustee, reference will be made as "the trustee." The agreement recited the lease, and the second recital, so far as material was: "And whereas, the car company has purchased "the said railroad equipment and/or rolling stock particularly "mentioned in the lease and has agreed to apply in part payment "therefor the proceeds of six million dollars ($6,000,000) par "value of equipment trust certificates, to be issued under the "terms of this agreement, and known as certificates of the "United Railways of Havana 15-year 7½ per cent. Equipment "Trust." Then by clause first the car company assigned to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By clause second the trustee covenanted "that it will from time to time execute and deliver "to the car company or upon its order in writing United "Railways of Havana 15-year 7½ per cent. Equipment Trust "certificates" [hereinafter referred to as "the certificates"] "aggregating in par value $6,000,000." Then the clause set out the intended form of the certificates. It was framed to fit in with the payment provisions of the lease: for instance, the due date of payment was February 15, 1936, the day after the day fixed for payment of the last rental under the lease, and payment was to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease, "but only from and out of the rentals when paid as "provided for in the lease . . . which rentals are payable to "the trustee for the benefit of" the certificate holders. Clause fourth dealt with the issue of the certificates. The money which the company required was provided pursuant to an underwriting agreement consisting of a letter dated February 9, 1921, written by Dillon Read & Co. of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause seventh opened: "In the event of default by the railway company, as "aforesaid, if it be thought necessary or convenient for the "purpose of enforcing and carrying out all the terms and stipulations of the lease and this agreement under the laws and "statutes of the Republic of Cuba"—then provision was made for the assignment of the lease and all rights thereunder, "to "any person or other corporation as substituted trustee "authorised to act or doing business in the Republic of "Cuba." Clause eleventh and the second sentence of clause twelfth were in similar terms to clause eleventh of the lease, but the trust agreement contained no submission to the jurisdiction such as that in clause twelfth of the lease. By an agreement dated April 27, 1922, the car company resold the rolling stock to the company, "subject to and with the benefit of the lease and "the agreement."

The position, therefore, at this point (without prejudice to any question of Cuban law) was that the company had received the net proceeds of the sale of the certificates to the public. It had the right, subject to performing its obligations under the lease, to have the property in the rolling stock revested in it. In the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. Finally, as a result of the resale by the car company to the company, the car company dropped out of the picture and was later dissolved.

Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,869,000. It defaulted in paying the instalment of $206,000 due on February 14, 1931, and all subsequent instalments. It had thus defaulted in respect of the last eleven instalments of capital, a total of $2,256,000. In this connection it is important to bear in mind that the certificates themselves imposed no liability on the company. The company's liability, assuming that it still existed, arose solely under the lease. Its liability was to pay to the trustee the proper sum in United States of America dollars necessary to discharge its obligations under that document. The certificates, in effect, did no more than evidence the amount which the holders thereof were entitled inter se to receive from the trustee, in so far as the trustee received payment from the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including August 14, 1934. The trustee took no step under clause sixth of the lease to declare the lease terminated. Apart, therefore, from any impact on the continued existence of the lease which Cuban law might have, assuming that it applied in this case, the lease was to be treated as continuing, the company being in default thereunder. The trustee took no step under the same clause to take possession of the rolling stock.

In 1934, 1940 and 1941 legislation was brought into force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930s. The benefit of the moratorium laws extended to public service railroad companies. On June 6, 1949, an interventor was appointed by the Cuban Government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets should be sold to the Cuban Government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock and shares was prepared, brought before the court, and sanctioned by Vaisey J. on December 15, 1952. Neither the holders of the certificates nor the trustee on their behalf were parties to the scheme, but

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the certificates were mentioned in Part IV, paragraph 13, of the Preliminary to the Scheme, where there was a statement that the certificates were not affected by the scheme. Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence, to which reference must now be made. The first was Law-Decree No. 980, dated July 24, 1953. Article 1 opened thus: "This Law-Decree is entitled 'Law-Decree on the acquisition, operation and rehabilitation of the United Railways of Havana and subsidiary companies.'" Article 3 authorised the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, article 6, dealt with the incorporation of this company, hereinafter referred to as "Occidentales." Article 8 provided that the State would convey the properties acquired from the company to Occidentales, "and the latter shall assume the liabilities, which the State shall have contracted by the acquisition of the properties." Article 13 provided that Occidentales "cannot sell the real estate they acquire as conveyed by the State except" as specifically provided in that article. Article 14 opened with the words "The State on making the conveyance. . . ."

A document entitled "Preliminary Agreement" was dated September 5, 1953. It concerned the company and a wholly-owned subsidiary of the company, hereinafter referred to as "Terminal," as vendors and the Cuban State as purchasers, and provided, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000. "which amount will be received . . . at the moment of signing the public deeds, by virtue of which there shall be transferred to the State in full and absolute dominion the assets and properties described in Annex A." Clause Fourth (B) was as follows: "The price agreed upon shall be received by 'The Uniteds' and 'The Terminal' free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties which are to be acquired by the State, whether involving operations prior to June 10, 1949, on which date said properties passed to the management of the Interventors of the Government of Cuba, or subsequent to that date." Included in annex A as assets was this item: "$1,867,000 of nominal "value, amount of the company's holding of the 7½ per cent. "Equipment Certificates." On the same day, namely, September 5, 1953, as the preliminary agreement was executed, another agreement—hereinafter referred to as "the confidential agree-"ment"—was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It was of importance, and the relevant provisions were as follows. It stated that the parties had agreed: "First: that among the liabilities in respect "of which the State liberates 'The Uniteds' from all respon-"sibility, in accordance with letter B of clause fourth of the pre-"liminary agreement signed on this same date between the same "parties, it is understood to be included the responsibilities that "may derive from the 7½ per cent. Equipment Trust Certificates "which were issued under agreement dated February 15, 1921, "between the Cuban Rolling Stock Company and Commercial "Trust Company, as trustees."

"Second: That what is established by this agreement does "not signify that the State or 'The Uniteds' acknowledge or "admit that there can exist legal merit in any claim, demand "or proceedings that may be established as a result of the "referred to 7½ per cent. Equipment Trust Certificates, but that "it is exclusively established what is mentioned in this agree-"ment in respect thereof for the supposed case that a sentence "may be handed down as a result of any claim, demand or pro-"ceedings derived from said 7½ per cent. Equipment Trust "Certificates, whether it be before courts of justice of the "republic or in foreign courts."

And, finally, in clause fifth, it was provided: "That the con-"tents of the present confidential agreement cannot be revealed "by any of the signing parties, but it will be understood that it "binds them just as if it had been stipulated in the preliminary "agreement referred to in paragraph first."

The second recital of Law-Decree 1197, dated November 26, 1953, is of importance. It stated: "Whereas: In accordance "with the provisions of Military Order No. 34 of 1902, it was "agreed in section (B) of clause fourth of the preliminary agree-"ment executed between the Government and the" company and two other companies "that the said companies as vendors "would receive the agreed price free from all responsibility with "respect to liabilities outstanding in Cuba, represented by debts, "obligations and responsibilities arising out of the operations of "the properties to be acquired by the State, and it is therefore

" appropriate to declare that the provisions of section (u), article " 1, of Chapter V of the aforesaid Military Order are inapplicable " to the liquidation of the three selling companies, since upon " the passing of such liabilities to the Cuban Government the " latter shall adopt such measures as it may deem appropriate " for the liquidation thereof." Article second provided that: " Section (u), article 1, chapter V, of Military Order No. 34 of " 1902 is declared inapplicable to the liquidation and dissolution " of the " company and two other companies.

By a deed of purchase dated December 1, 1953, the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being " in a real and effective manner " absolutely free from encumbrances." The seventeenth clause provided: " That in consequence of the sale hereby accomplished, " they transfer in favour of the Cuban State the full and absolute " dominion and possession, with such further rights and equities, " real and personal, without any exception, as the vendors have " or hold in the properties before mentioned, the Cuban State " receiving them as its own, acquired by a just and legitimate " title, as is the present deed, which at all times shall be considered as symbol of real delivery and possession and leaving " the Cuban State subrogated in the same place and stead of the " vendors." The twentieth clause read as follows: " That in the " purchase-sale are included all the assets and any other properties " situated in the Republic of Cuba, without exception whatsoever, " which comprise and constitute the railroad system which the " vendors have been operating." On the same date as the deed of sale was executed, namely, December 1, 1953, a document, which was not in evidence and the precise terms of which were not known, was executed, the parties being the Cuban State and a company herein referred to as " Occidentales," by which the Cuban State sold to Occidentales the undertakings which it had acquired. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing before Wynn-Parry J. that certain property was retained by the State. The purchase price was duly paid by the Cuban State in United States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provision of the scheme of arrangement. On March 4, 1954, the company went into voluntary liquidation.

On June 18, 1954, the respondent, who was the present trustee for the certificate holders, lodged a proof. The basis of the claim appeared in paragraph 4 of the proof, which read as follows:

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" The claimant is the present trustee for the holders of the said " certificates, being the successor in office of Commercial Trust " Company of Philadelphia the original trustee thereof. The " liability of the company to the claimant which is the subject-" matter of this proof arises under or by virtue of a covenant by " the company with Cuban Rolling Stock Company contained in " an agreement dated February 15, 1921, but executed on April " 18, 1921, between the said Cuban Rolling Stock Company of the " one part and the company of the other part the benefit whereof " including the ownership of the said railway equipment was by " a trust agreement dated February 15, 1921, but executed on " April 18, 1921, assigned by the said Cuban Rolling Stock " Company to the said original trustee of whom the claimant is " the successor in title."

Paragraph 2 of the proof quantified the claim under four heads as follows: " 2 (a) The sum of £264,076 0s. 1d. being the sterling " equivalent on the said date (calculated at the rate of 2.80 " dollars to the £) of 739,412.81 United States dollars due and " payable to the claimant in respect of 333,000 dollars in face " value of United Railways of Havana 15 year 7½ per cent. " Equipment Trust Certificates then outstanding in the hands of " members of the public as follows namely a sum equal to:

" Face value	333,000.00 dollars
" Premium of 2½ per cent. on the said " face value	8,325.00
" Interest at the rate of 7½ per cent. " per annum on the said face value " from August 15, 1935, to February " 14, 1936	37,462.50
" Interest at the rate of 6 per cent. " per annum on the said face value " from February 15. 1936, to March " 4, 1954	360,625.31
	739,412.81 dollars

" (b) In addition thereto the sum of £11,177 6s. 9d. being the " sterling equivalent at the rate of 2.80 dollars to the £ of " the aggregate amount of the reasonable expenses incurred by the " claimant down to March 4, 1954, in the performance of the trust

" under which the said certificates were issued. Details of the said " expenses are as follows:

" Out of pocket expenses of claimant	2,255.46	dollars
" Claimant's legal expenses	20,000.00	
" Claimant's fee as trustee at 275 " dollars per annum	9,041.10	
	31,296.56	dollars

" (c) In addition thereto the sum of £20,000 being the sterling " equivalent of the amount which the claimant estimates to be " the value of its future or contingent claim in respect of expenses " incurred or to be incurred by it subsequent to March 4, 1954, " in the performance of the said trusts until the same shall have " been fully performed.

" (d) In addition thereto (subject as hereinafter mentioned) " £1,480,570 5s. 7d. being the sterling equivalent on March 4, " 1954 (calculated at the rate of 2.80 dollars to the £), of " 4,145,596.78 United States dollars, due and payable to the " claimant in respect of 1,867,000 dollars in face value of United " Railways of Havana 15-year 7½ per cent. Equipment Trust " Certificates which had been purchased by the company as " follows, namely a sum equal to:

" Face value	1,867,000.00	dollars
" Premium on 2½ per cent. on the said " face value	46,675.00	
" Interest at the rate of 7½ per cent. " per annum on the said face value " from August 15, 1934, to February " 14, 1936	210,037.50	
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, " 1954	2,021,884.28	
	4,145,596.78	dollars."

The court was not concerned with paragraph 2 (d) of the claim, because any claim in respect of those certificates was renounced, and on that basis Roxburgh J., by an order of December 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of those certificates. The main claim was a claim in contract under the lease. Two alternative claims in paragraph 4 were abandoned at the hearing before Wynn-Parry J., but the trustee pursued, as alternative to his main claim and as alternative to each other, two further claims, the first for damages for breach of the covenant in the lease not to assign the rolling stock without the consent of the trustee, and the second for damages for conversion of the rolling stock by the company. In connection with the last two items, it is relevant to mention that in a letter dated July 2, 1953, from the secretary of the company to the trustee, it was stated that for financial reasons the insurances effected by the company were being reduced in amount, and, in pursuance of that policy, the insurance of the rolling stock had been reduced to a value of $2,000,000, "being "the estimate of the present day value of this rolling stock "calculated by reference to an inventory made in June, 1948, "subject to depreciation since then." On November 19 the liquidators rejected the proof. From this rejection the respondent appealed. Wynn-Parry J. allowed the appeal. The liquidators appealed.

John Megaw Q.C., *Kenneth Mackinnon Q.C.* and *Richard Hunt* for the liquidators. (1) The first question is whether under the rules of English private international law Cuban law is applicable to determine whether liability for the debt in question was transferred away from the company to the Cuban State. It is submitted that this question depends upon the situs of the debt on December 1, 1953, and that the situs was Cuba. If the above contention be rejected and the true view is that this question depends upon the proper law of the contract, then the proper law was Cuban law. (2) If Cuban law applies, then the next question is whether Cuban law had the effect of transferring liability away from the company to the Cuban State. (3) If the appellants' contentions under either heads (1) or (2) are answered in the negative, then the next question is: what is the quantum of the company's liability apart altogether from Cuban law? (4) The fourth question is: was the company guilty of conversion in selling the rolling stock, and, if so, what is the quantum of damages? (5) Finally, was the company liable for breach of covenant in selling the rolling stock, and, if so, what is the quantum of damages?

(1) Where it is a question of statutory novation of a debt, that is, either a debt due to A and made payable to B, or a debt due from X and made payable by Y, English law looks only at the situs of the debt at the date of the relevant foreign legislation: see rule 130, Dicey's Conflict of Laws, 7th ed., pp. 662–665; exceptions to the above rule are matters relating to bankruptcy and modifications of a contract short of novation, which are governed by the proper law of the contract: see rules 146 and 155, Dicey's Conflict of Laws, 7th ed., pp. 708, 804, 805. [Reference was also made to rule 147, Dicey's Conflict of Laws, 7th ed., p. 712.]

[Romer L.J. Rule 130 of Dicey is confined, is it not, to a novation brought about by a governmental act? Does the rule apply where the novation is brought about by the general law?]

It is submitted that it does apply in the latter case. An English court looks exclusively at the situs of the debt where the foreign legislation has the effect of creating (i) a new creditor: *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [1]; *Arab Bank Ltd.* v. *Barclays Bank* [2]; (ii) a new debtor: *In re Russian Bank for Foreign Trade.*[3] In the *Russian Bank* case [4] the original Russian decree transferred assets *and* liabilities to the State Bank; there was no purported cancellation of liabilities but a purported transfer of assets and liabilities. Reliance is placed on that decision for this proposition: where the law of a foreign country purports to transfer liabilities for a debt from one person to another, English law will apply the foreign law if the debt is situate in that country. It is submitted that Wynn-Parry J. misunderstood the import of the *Russian Bank* case.[5] Further, it is submitted that Vaisey J.'s reference to the proper law of the contract in *In re Banque des Marchands de Moscou (Koupetschesky)* [6] was per incuriam. Where a debt is under the terms of the contract payable in country "A," but at the relevant date the debtor is not resident in that country, the situs of the debt is not country "A": see *per* Romer L.J. in *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou,*[7] quoted by Roxburgh J. in *In re Banque des Marchands de Moscou*

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[1] [1954] 1 W.L.R. 139, 152–157; [1954] 1 All E.R. 145.

[2] [1954] A.C. 495, 529, 534; [1954] 2 W.L.R. 1022; [1954] 2 All E.R. 226.

[3] [1933] Ch. 745, 765, 766; 49 T.L.R. 253.

[4] [1933] Ch. 745, 757, 758.

[5] Ibid.

[6] [1952] 1 T.L.R. 739, 744; [1952] 1 All E.R. 1269.

[7] December 14, 1931 (unreported).

(*Koupetschesky*) (*No. 2*).[8] Applying the above principle to the present case; the debtor was not resident in any part of the United States of America in 1953, therefore the situs of the debt is nowhere within the United States of America. *Perry* v. *Equitable Life Assurance Society of the United States of America*[9] is of no assistance on this question, for that was a case of the extinguishment or annulment of a contract, which is governed by the proper law. Further, as no payment became due under the policy until the year 1923, and the contract was annulled in 1919, no chose in action had arisen, so there was nothing to which any lex situs could apply: *per* Pearson J. in *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property.*[10] Similar considerations apply to *In re Claim by Helbert Wagg & Co. Ltd.*,[11] for the sums there claimed were not due at the date of the coming into force of the moratorium law.

If, as is contended, the first question is determined by the lex situs, the question then arises, how is the situs of the debt ascertained? It is submitted that where the debtor has a dual residence at the relevant time, neither of which is the contractual place of payment, the situs is that country with which the debt is most closely connected. The fact that the debtor is a corporation does not affect the general principle; the principle of income tax law that a limited company is deemed, for the purposes of liability to income tax, to be resident in the country where it has its head office, has no application for present purposes. There is no direct authority on this question, but support for the proposition stated above is to be found in *New York Life Insurance Co.* v. *Public Trustee*,[12] where Pollock M.R. states, in effect, that where the contract prescribes the place of payment, that is the situs of the debt, but if there is no such provision in the document, then the situs is deemed to be the place with which the contract is most closely connected. In that case a corporation had a dual residence, New York and London, and in those circumstances it was permissible and necessary to look at the contracts in question to ascertain at what place the debts would be recoverable. It was held that they were recoverable in London where they were expressed to be payable. In *In re Claim by Helbert Wagg & Co.*

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[8] [1954] 1 W.L.R. 1108, 1114, 1115; [1954] 2 All E.R. 746.

[9] (1929) 45 T.L.R. 468.

[10] [1954] 1 W.L.R. 139, 154; [1954] 1 All E.R. 145.

[11] [1956] Ch. 323, 339, 342–344; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.

[12] [1924] 2 Ch. 101, 105 et seq.; 40 T.L.R. 430.

Ltd.[13] it was held that the locality of the debt was in Germany, since that was the only place where the debtor resided, although the debt was payable under the contract in London. But it is to be observed that that was not a case where the debtor had a dual residence. In the present case the situs of this debt is Cuba, since that is the country with which it is most closely connected. [Reference was made to rule 84 and comment thereon in Dicey's Conflict of Laws, 7th ed., pp. 502, 504.]

If the above contention be rejected and it is held that this question depends on the proper law of the contract, then it is submitted that the proper law of this contract was the law of Cuba and not that of Pennsylvania as Wynn-Parry J. held. Clause 7 of the trust agreement is strong confirmation that the parties intended Cuban law to be the proper law of the contract. This is reinforced by clause 7 of the lease, which contains a covenant which is stated to be of the essence of the contract, and breach of which would plainly lead to proceedings in the Cuban courts. In those circumstances, it can hardly be conceived that the rest of this document is governed by some other law. The law of Pennsylvania is not the lex loci contractus nor the lex of assignment and only in part the lex loci solutionis.

The following factors are relevant in determining the proper law: (a) The lease was between an English company and a Delaware company. (b) The place where the lease was made was New York, namely, in a State which has a different system of law from Pennsylvania. (c) The subject-matter of the lease was the loan of rolling stock in Cuba. (d) The payments under the lease were expressed to be rentals derived from the operation of a railway in Cuba. The payments were to be made partly in Philadelphia, Pennsylvania, and partly in New York. (e) If there was default in payment the security had to be enforced and could only be enforced in Cuba, where it was subject to Cuban public utility law. (f) The rolling stock might be deemed to be immovables under the law of the intended situs, that is, Cuba.

It is to be observed that the only Pennsylvanian elements were the fact that Pennsylvania was the residence of the trustee, who was not a party to the lease, and the fact that part of the payments under the lease were to be made in Philadelphia. The other American elements are irrelevant, because for present purposes it is necessary to consider the law of a particular State of the Union, for example, Delaware, Pennsylvania, New York, and,

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[13] [1956] Ch. 323.

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accordingly, since there is no reference to the law of any particular State, that is strong evidence that American law was not intended to govern this contract.

It is submitted that clauses 11 and 12 of the lease make it plain beyond doubt that the parties intended the proper law to be Cuban. Wynn-Parry J.[14] construed clause 11 as being narrow in its scope and held that the sole purpose for stating therein that the lease was to be executed in accordance with the law of Cuba was in order to protect the trustee's title. But it follows from this that the parties intended Cuban law to be the proper law of the lease in so far as concerned any question of title under the lease. If Cuban law was applicable in respect of questions of title and enforcement it is difficult to see why Cuban law should not be the proper law of the whole lease. It is true that there are decisions which show that the law of different countries can govern different parts of a contract, but there does not seem to be any sufficient reason why that principle should apply in the present case. Clause 12 is intended to be an exclusive jurisdiction clause in the widest sense; there is no ambiguity in the use of the word "formalities" in that clause; all it means is "all "proceedings that can be put in a legal form."

It is submitted, accordingly, that under the rules of English private international law Cuban law is the proper law of the lease and the trust agreement, to which similar considerations apply, for all purposes. Further, as regards the moratorium laws, English law will refer to the proper law of the contract, which in this connection also is the law of Cuba. Wynn-Parry J. has held,[15] however, that even if under English private international law the proper law was Cuban, nevertheless it is necessary to consider the whole of Cuban law, including Cuban private international law under the rules of which the proper law, in the circumstances would be the law of Pennsylvania. In other words, the judge has applied the doctrine of renvoi in the field of contract, in which, it is submitted, it has no application. If Cuban law applies in the present case, it is confined to the *domestic* law of Cuba. It is most undesirable that the renvoi doctrine should apply to commercial contracts: see Dicey's Conflict of Laws, 7th ed., pp. 72, 73, 721, 722. The dictum of Lord Wright, delivering the judgment of the Judicial Committee of the Privy Council in *Vita Food Products, Inc.* v. *Unus Shipping Co.*,[16] which appears to favour the use of the renvoi doctrine in the law of contract, should not be followed: see the article by Morris and Cheshire in (1940) 56 Law Quarterly Review 320, 333–335, the reasoning of which is adopted. If it be held, contrary to the above contention, that English law refers to Cuban law including Cuban rules of private international law, then it is submitted that those rules are the same as the English rules for ascertaining the proper law of the contract, and that, therefore, the result must be the same, namely, Cuban law.

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[14] [1958] Ch. 724, 757, 758.

[15] Ibid. 760.

[16] [1939] A.C. 276, 291, 292; 55 T.L.R. 402; [1939] 1 All E.R. 513.

(2) The question whether the rolling stock is movable or immovable property in Cuba is decided by an English court by reference to the lex situs. [Reference was made to *In re Fitz-Gerald.*[17]] In Cuban law, being the lex situs, the rolling stock was at all material times immovable property. In Cuban law, the liability here in question—"rentals" under the lease—was transferred away from the company by compulsory novation without necessity for the consent of the trustee, by virtue of Military Order 34 of 1902, either of its own force or as applied by Law Decree 1197 to this transaction, operating upon the expressed intention of the parties as set out in the agreements of sale. If the above contention be rejected, then it is submitted that Cuban law (being the proper law of the contract) provided that the moratorium laws were applicable, and the liability of the company for the debt—the "rentals"—was reduced accordingly.

(3) In any event, and whatever law applies (including Pennsylvanian law), the quantum of liability as awarded by Wynn-Parry J. is too great, because, in view of the form of the proof of debt, and the order of Roxburgh J. dated December 4, 1956, the claim in paragraph 2 (*d*) of the proof of debt has been disallowed; the trustee is thus limited to its claim in paragraphs 2 (*a*), (*b*) and (*c*), subject to the recalculation of those claims to give effect to (i) the alteration from 333 to 331 certificates, and (ii) the recalculation of the several items at the rates of exchange prevailing at the dates when the respective instalments fell due: see *In re Russian Commercial and Industrial Bank.*[18]

(4) The claim for conversion fails, since (i) the trustee never had title to the rolling stock, and (ii) what is more important for present purposes, the trustee never had an *immediate right to possession* (in view of the provisions of Cuban law preventing it from obtaining possession), which is a necessary element in

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[17] [1904] 1 Ch. 573, 588.

[18] [1955] Ch. 148; [1955] 2 W.L.R. 62; [1955] 1 All E.R. 75.

English law to found a successful action in trover: see Winfield on Tort, 6th ed., p. 418. [Reference was also made to *Kahler* v. *Midland Bank Ltd.*[19]] Accordingly, the trustee's claim under this head fails to satisfy the first branch of rule 181 in Dicey's Conflict of Laws, 7th ed., p. 940, namely, that for an act done in a foreign country to be a tort, and actionable as such in England, it must be an act which, if done in England, would be a tort.

(5) The claim for breach of covenant fails, because: (i) The covenants in the lease ceased to apply, by merger, when the rolling stock was resold to the company in 1922. (ii) The covenants in the lease ceased to apply on the expiration of the term of the contract (the lease) in 1936. (iii) Clause 5 of the lease applied only to the company's interest in the rolling stock. (iv) Clause 5 of the lease provided its own exclusive remedy (not damages) for sale of the rolling stock by the company. (v) The company did not sell the rolling stock, by reason of clause 29 of the deed of sale.

As to the question of damages under heads (4) and (5), it is submitted that if there be liability for damages for conversion or breach of covenant, (i) those damages are only nominal, because the trustee cannot recover more than the value of its interest in the rolling stock (see *Belsize Motor Supply Co.* v. *Cox*[20]), and, in view of its inability to obtain possession under Cuban law, that value was nil; (ii) in any event, the entitlement of the trustee under either of these two heads cannot exceed (a) the proper amount of its claim in the proof of debt under the first alternative claim (paragraphs 2 (*a*), (*b*) and (*c*) as adjusted), or (b) 331/2200 parts of the value of the rolling stock on December 1, 1953, whichever be the less.

R. O. Wilberforce Q.C. and *R. B. S. Instone* for the trustee for the certificate holders. It is not disputed that the moneys agreed to be paid under the lease remained payable until November, 1953. But it is contended by the appellants that this undisputed liability to pay, which was of a personal character, was extinguished on the sale by the company of its undertaking and assets to the Cuban State on December 1, 1953. It is plain that under English law that is no defence to the trustee's claim. But it is said that this transaction is governed by Cuban law and that this fact is an impediment which defeats the trustee's claim.

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[19] [1950] A.C. 24, 26, 33, 52, 54, 56; 65 T.L.R. 663; [1949] 2 All E.R. 621.

[20] [1914] 1 K.B. 244, 251.

The appellants concede that the question whether the moratorium laws apply, which may delay or partially or totally cancel the obligation to pay, is governed by the proper law of the contract. A simple discharge of a debt is also governed by the proper law. But it is alleged that the question of novation of a debt is governed by the lex situs. But in this connection it is necessary to draw a distinction between assignment and novation. The assignment of a debt is a pure question of transfer. The debtor is not concerned with the transaction except in so far that he must be given notice of whom the new creditor is. But a novation is not a transfer of anything; it is the annulment of one claim and the creation of a new one. A novation requires the consent of the creditor, for the personality of the debtor may be of vital importance, for example, the new debtor may be a man of straw, a government which can claim sovereign immunity, a person residing outside the jurisdiction: see Anson on Contracts, 20th ed., p. 263, where it is stated that a novation can only take place by agreement between the parties.

In private international law when a question of novation arises there are two matters to be considered: (a) it is first necessary to ascertain whether the original debt has been discharged. That is governed by the law applicable to discharge, that is, the proper law of the contract, namely, the law which the parties intended to govern their obligations; (b) there then arises the question who is liable under the new contract, which may be governed by the same law as under (a), or some other law.

The appellants seek to say that the law governing discharge of a contract is the lex situs, but that is illogical and is a disastrous doctrine because it places the law governing discharge purely at the mercy of the debtor, since the lex situs is normally the place of the debtor's residence. In analysing this problem it is necessary to examine and to distinguish between three types of case. Let A represent the creditor and B the debtor. (i) In the first case the question is whether A's claim against B has been transferred to C, for example, by reason of trading with the enemy legislation or a garnishee order. Here one is concerned with the transfer of a piece of movable intangible property to which English private international law will ascribe a situs and the law of the situs will govern the transaction: see *Arab Bank Ltd.* v. *Barclays Bank.*[21] (ii) In the second class of case, B, the original debtor, has either been dissolved or transferred into C, so that the person to be sued is C, not B. The validity of this transaction is determined by the personal law of B: *National Bank of Greece and Athens S.A.* v. *Metliss.*[22] This is not a novation. (iii) In the third category comes the present case, in which the question arises whether B, the original debtor, who is still in existence, has been discharged and C has become liable in place of him. This may be a matter for two different systems of law as suggested above. Reliance is placed on section 441 of Wolff's Private International Law, 2nd ed., p. 458, as correctly stating the law, namely: "The question whether the old debtor "is discharged by the entry of a new debtor depends on the "proper law of the debt. But whether the entry of a new debtor "has taken place must be determined by the law with which that "entry is most closely connected; this may be the new debtor's "personal law or the law of his place of business, unless he and "the creditor have agreed on a particular legal system."

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[21] [1954] A.C. 495.

In the comment on rule 155 of Dicey's Conflict of Laws, 7th ed., p. 810 (discharge of contract governed by the proper law), the editor states: "There is, it seems, no authority on the question "what law governs the substitution by express agreement of one "debtor for another, and one may tentatively submit that this is "governed by the proper law of the contract. Where, however, a "change in the person of the promisee or creditor or the promisor "or debtor results from legislative, administrative or judicial "intervention, the courts do not generally consider the proper "law of the contract as relevant in determining the validity of "the change." But it is submitted that this is not a sound distinction in principle and that the authorities there cited do not support it. Unless it be limited to the decision of the House of Lords in *National Bank of Greece and Athens S.A.* v. *Metliss*[23] (category 2 above), the proposition as stated is too wide. Compare the view of the same writer (O. Kahn-Freund) subsequently, in his note on the decision of Wynn-Parry J. in the present case in (1958) 21 Modern Law Review, pp. 174–177, where he accepts as correct Wynn-Parry J.'s decision that "the question whether "the contractual rights of the applicants under the lease had "been extinguished was governed by the proper law of the con-"tract and not by that of the situs of the debt." The writer accepts that there is a distinction between cases relating to the title to the debt, that is, where not its existence or extinction, but the identity of the creditor, is involved, that is, where the debt is to be considered not as a contractual obligation but as a piece of property, and this type of case, and that this type of case is governed by the proper law. [Reference was also made to rule 143, Dicey's Conflict of Laws, 6th ed., p. 651, and to Dicey, 7th ed., pp. 807–809.]

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[22] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

[23] [1958] A.C. 509.

Antony Gibbs & Sons v. *La Société Industrielle et Commerciale des Métaux* [24] supports the respondents' case and cannot be distinguished merely on the grounds that it relates to bankruptcy. It is plain that Lord Esher M.R.'s judgment is not confined to discharge merely by way of bankruptcy, and, even if the contrary contention were upheld, it still supports the respondents' case, for bankruptcy is a mode of discharge, and there is no reason in principle why some law other than the proper law should apply. Further, both Dicey's Conflict of Laws, 7th ed., p. 805, and Cheshire's Private International Law, 5th ed., p. 499, treat the decision as a general authority relating to discharge of contract. Moreover, rule 146 of Dicey's Conflict of Laws, 7th ed., p. 708, states the rule as to discharge by bankruptcy in terms similar to rule 155. [Reference was made to *Ellis* v. *M'Henry* [25]; *Kahler* v. *Midland Bank Ltd.* [26]; *Adams* v. *National Bank of Greece and Athens S.A.* [27] and *Merwin Pastoral Co. Proprietary Ltd.* v. *Moolpa Pastoral Co. Proprietary Ltd.* [28]]

The appellants rely in support of their contention that the lex situs is applicable on *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property* [29] and *Arab Bank Ltd.* v. *Barclays Bank.* [30] But both those cases are distinguishable as relating to the *title* to debts and choses in action, and, accordingly, they fall within category (1) above, which the respondents concede are transactions governed by the lex situs. It is submitted that O. Kahn-Freund rightly considered the *Russian Bank* cases to be anomalous: see 21 Modern Law Review, 177, above cited. These cases concerned Russian corporations which were dissolved under Russian law by Russian decrees passed in the years 1917 to 1919. But there is provision in English law, under the Companies Act, for a foreign company which has been carrying on business in the United Kingdom to be wound up here. The problem which those cases raised was: how are the creditors to be dealt with in the winding up of companies which have long since become extinct? Are all creditors to be allowed to prove or only a limited class of creditors? In general it may be said that the English courts have held that Russian creditors could not prove in the English winding up in respect of Russian debts. No distinction is drawn in those cases between the proper law of the debt and the lex situs, and this is not surprising, because generally in the case of banks the situs of the debt and the proper law are the same. All the *Russian Bank* cases raised the point that the debts had been extinguished by reason of the passing of confiscatory decrees, and therefore it had to be considered whether such decrees should be given recognition outside Russia. Reliance has been placed on Maugham J.'s decision in *In re Russian Bank for Foreign Trade* [31] and the reference therein to statutory novation, but that cannot be taken to be an authoritative decision on this subject, since the question of the applicability of the proper law was not canvassed in argument, it being assumed that the lex situs of the bank's debts controlled the creditors' rights. As to *In re Banque des Marchands de Moscou*,[32] Vaisey J.'s reference to the proper law cannot be said to be per incuriam. As to *In re Banque des Marchands de Moscou (No. 2)*,[33] the main basis for the decision was that the debts in question were Russian debts which were not within the ambit of section 261 of the Companies Act, 1948, so as to be provable against English assets in an English winding up. In fine, the *Russian Bank* cases are distinguishable. The fact that they refer to the situs of the debts is explicable by reason of the confiscatory nature of the Russian decrees. Those cases cannot weigh against the other authorities and more general principle that the law which governs discharge of a contract is the proper law of the contract.

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[24] (1890) 25 Q.B.D. 399, 405, 406; 6 T.L.R. 393.

[25] (1871) L.R. 6 C.P. 228, 234.

[26] [1950] A.C. 24, 56.

[27] [1958] 2 Q.B. 59, 74–78; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3.

[28] (1932) 48 C.L.R. 565.

[29] [1954] 1 W.L.R. 139.

[30] [1954] A.C. 495.

If, contrary to the above contentions, it be held that the relevant law is the lex situs, then it is submitted that the present case is not governed by authority. The debtor has a dual residence neither of which is the place of payment prescribed by the contract. In those circumstances the appellants have suggested, as the test to determine the lex situs, that the situs is that place with which the debt is most closely connected. But is that not precisely saying that it is the proper law of the debt? It is a classic description of what is the proper law: see Dicey's Conflict of Laws, 7th ed., p. 719, where it is stated: "The most satis-"factory formulation . . . is that the proper law, i.e., the law

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[31] [1933] Ch. 745, 765, 766.

[32] [1952] 1 T.L.R. 739.

[33] [1954] 1 W.L.R. 1108.

" ' by reference to which the contract was made,' is the one ' with " ' which the transaction has its closest and most real connec- " ' tion ' " (*per* Viscount Simonds in *Bonython* v. *Commonwealth of Australia*[34]). Because there must be a single governing law applicable to this contract, it does not follow that either English law or Cuban law is the law most closely connected with this debt. If it be said that this debt was situate solely in the Republic of Cuba it would lead to the extraordinary position that an English court in respect of the winding up of an English company would have no jurisdiction over this debt, and the court could not vest it in a third person, for example, by making a garnishee order.

It is submitted that one can accept Atkin L.J.'s observation in *New York Life Assurance Co.* v. *Public Trustee*[35] that " simple " contractual obligations can be situate in more than one place," and that, therefore, this debt is situate both in England and Cuba, without destroying the argument that the discharge of a debt is governed by the proper law and not the lex situs, especially where the debtor has a dual residence neither of which is the contractual place of payment.

Payne v. *Rex*[36] is cited to refute any suggestion that the present debt is a security and, accordingly, governed by the lex situs of the property secured, for in that case it was held that a mortgage debt was situate not at the place where the mortgaged property was but at the place where the debtor resided. In conclusion, it is submitted that if it be held that the lex situs is applicable, then the situs of the debt at the material time was England or at least cannot be said to have been Cuba.

On the assumption that the relevant law to be applied is the proper law of the contract, the question arises: What is the proper law? The court is here faced with the difficult problem of imputing to the parties at the time of entering into the contract what law they intended to govern the substance of their obligations under it. It is not disputed that the law governing the substance of the contract is a single system of law. But that does not mean that other systems of law may not be relevant in respect of different parts of the contract, for example, in determining the incidents and mode of performance; but the contract as a whole is still governed by its proper law: *per* Lord Wright in *Vita Food Products, Inc.* v. *Unus Shipping Co.*[37] The fact that the contract is to be partly performed in a foreign country

[34] [1951] A.C. 201, 219.
[35] [1924] 2 Ch. 101, 121.
[36] [1902] A.C. 552; 18 T.L.R. 725.
[37] [1939] A.C. 277, 291.

is a factor, but no more, to be taken into account in determining the proper law.

A perusal of the "lease" of 1921 makes it plain that it was a financing transaction providing for a loan to be made to the company and repayment of that loan. That is the essential provision of the document, the repayments being designated "rental." But this was not a lease in the sense in which that term is used in the English law of real property. It contained provisions that the rolling stock was to remain in Cuba, which could involve proceedings being brought in Cuba. This document constituted a security but not a mortgage for the repayment of the loan. The lease itself was not concerned with any question relating to the title of property situate abroad. Further, the transaction comprised in the lease was not a sale.

The two relevant documents for the purpose of ascertaining the proper law are the lease and the trust agreement. Both documents were executed on April 18, 1921. The lease recited that the rolling stock was to be transferred to the trustee. It would be strange if the documents were governed by different systems of law. The trust agreement dealt with the title to the property. It is submitted that both documents must be treated as relating to one transaction.

Apart from the provisions of clauses 11 and 12 of the lease and the trust agreement, there could be no doubt that Cuban law was not intended to govern this transaction. It is a strong thing to say that the lease was intended to be governed by Cuban law when one considers that the document is in the English language and contains concepts which are only to be found in English/American law, for example, trusts. Further, clause 7 of both documents contemplates the remedy of specific performance in certain circumstances. [Reference was made to Dicey's Conflict of Laws, 7th ed., pp. 151, 175.]

It is submitted that taking both documents as a whole it is plain that American law was intended to govern the transaction. In those circumstances it becomes necessary to ascertain the particular State of the Union whose law was intended to be applied. The transaction as represented by the lease was a Pennsylvanian transaction with Cuban elements in it. Cuban law was only contemplated (i) to provide for the protection of the trustee in Cuba; (ii) for effective action to be taken in the Cuban courts if that became necessary. These objectives were secured by clause 11 of the lease and trust agreement, and clause 7 of the trust agreement respectively. Neither of these objectives required or would be assisted by subjecting the whole transaction to Cuban law. It is submitted that clause 12 of the lease is a limiting clause and is not an express provision as to the proper law; it falls far short of submitting all matters which might arise under the document to Cuban law. Further, it is submitted that, even if Cuban law were applicable, an English court would take into consideration that (as found by Wynn-Parry J.[38]) a Cuban court would apply the law of Pennsylvania as the proper law.

On the question whether the rolling stock was movable or immovable property, it is agreed that that is to be decided by the lex situs. Under Cuban law the rolling stock was movable and personal property.

As to the company's present liability, it is submitted that the company's obligation under the lease was not discharged by the sale to the Cuban State, since, inter alia, (i) even assuming that Cuban law was the proper law of that obligation, or otherwise applicable, Wynn-Parry J. was right in holding that there was no sufficient evidence of any provision of Cuban law which had the effect of discharging it; (ii) in any event the proper law governing the company's liability to pay which, and not the lex situs, is the relevant law was not Cuban law but was the law of Pennsylvania, under which it is not disputed that discharge could not take place without the consent of the creditor.

The respondents' contentions in answer to the remaining questions raised by the appellants can be summarised as follows: (a) Even if Cuban law is the proper law, the moratorium laws do not apply. (b) The amount of the proof as admitted by Wynn-Parry J. is correct. No recalculation is necessary. (c) The claim for conversion is good because: (i) the trustee had title to the rolling stock; (ii) the trustee had the immediate right to possession. (d) The claim for breach of covenant is good because: (i) the covenant did not cease to apply by merger in 1922; (ii) the covenants did not determine on the expiration of the fixed term of the lease in 1936; (iii) clause 5 of the lease is not limited to the company's interest in the rolling stock; (iv) the remedy provided in clause 5 is not exclusive. (e) The damages for conversion or breach of covenant: (i) are not nominal; (ii) were correctly assessed by Wynn-Parry J.

[Reference was also made to *Kahler* v. *Midland Bank Ltd.*[39]; *Belsize Motor Supply Co.* v. *Cox*[40]; *Wedd* v. *Porter*[41]; *In re*

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[38] [1958] Ch. 724, 760.

[39] [1950] A.C. 24, 52, 53, 56.

[40] [1914] 1 K.B. 244.

[41] [1916] 2 K.B. 91, 98.

Russian Commercial and Industrial Bank[42]; *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[43] and *Rouyer Guillet* v. *Jackson, Knowland & Co.*[44]]

Megaw Q.C. in reply. The respondents have placed reliance on section 441 of Wolff's Private International Law, 2nd ed., p. 448, as supporting their argument on novation. It is submitted that Wolff's proposition is wrong; there is no authority cited in support of it. It is not consonant with English law. In English law the novation of an existing debt is looked upon as one transaction, the transfer of a single debt. To determine the effectiveness of the compulsory transfer of a creditor's rights to another an English court looks solely at the lex situs: *Arab Bank Ltd.* v. *Barclays Bank.*[45] It is submitted that the same principle applies where it is the case of the compulsory substitution of one debtor for another. Strong reliance is placed on the decision of Maugham J. in *In re Russian Bank for Foreign Trade*,[46] which is completely contrary to the statement in section 441 of Wolff's Private International Law, 2nd ed., p. 448.

Gibbs' case[47] is distinguishable, for it related to discharge by bankruptcy, which has always been treated in a separate category from discharge generally. In this connection is to be observed that the Imperial Statutes relating to bankruptcy make no reference to the proper law. [Reference was made to rule 147, Dicey's Conflict of Laws, 7th ed., p. 712.] The statement of Bovill C.J. in *Ellis* v. *M'Henry*[48] that a "debt or liability arising "in any country may be discharged by the laws of that country" is plainly a reference to the situs of the debt and not the proper law, and that statement was approved and applied by Bankes and Scrutton L.JJ. in *Swiss Bank Corporation* v. *Boehmische Industrial Bank*,[49] and is strong authority against the view that the discharge of this debt is governed by the proper law.

It was suggested that if the lex situs were to govern this type of discharge, that might enable the debtor to evade payment by choosing to reside in a country whose laws enabled him so to do. It is submitted that in general that difficulty is surmounted by applying a principle analogous to that applied in *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property*,[50] namely, that the debt is situate in that place where it is primarily payable.

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[42] [1955] Ch. 148.

[43] [1933] A.C. 289; 49 T.L.R. 94.

[44] [1949] 1 All E.R. 244n.

[45] [1954] A.C. 495.

[46] [1933] Ch. 745, 766.

[47] 25 Q.B.D. 399.

[48] L.R. 6 C.P. 228, 234.

[49] [1923] 1 K.B. 673, 678, 681, 682.

[50] [1954] 1 W.L.R. 139.

In the present case the debtor has a dual residence, neither of which is the contractual place of payment. In these circumstances and in view of the fact that at the relevant date the debtor was not resident at any place where payment was prescribed under the contract, namely, Philadelphia or New York, the situs of this debt was not Pennsylvania or New York, or, in fact, anywhere in the United States of America: *In re Banque des Marchands de Moscou (No. 2)*.[51] What, therefore, was the situs of this debt? It is submitted that it was plainly Cuba—the place with which it was most closely connected.

If it be held that this transaction is governed by the proper law, then it is submitted that it was the law of Cuba. The whole essence of the Philadelphian plan was that the loan was to be secured by property, and in this case the property was situate in Cuba. Further, if the parties to the lease and trust agreement contemplated that their obligations were to be governed by American law, it might well be asked why there was no provision in those documents as to which State law was applicable. The answer surely is that the parties never contemplated any other law but Cuban law to govern the transaction, and this is borne out by the express provisions relating to Cuban law to be found in clause 7 of the trust agreement and clauses 11 and 12 of both documents.

[Reference was also made to *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*[52]; *Adams* v. *National Bank of Greece and Athens S.A.*[53]; *Perry* v. *Equitable Life Assurance Society of the United States of America*[54]; *In re Azoff-Don Commercial Bank*[55] and *Arab Bank Ltd.* v. *Barclays Bank.*[56]]

Cur. adv. vult.

December 8, 1958. Jenkins L.J. The judgment I am about to deliver is the judgment of my brother Romer and myself. It is concurred in by my brother Willmer except on certain aspects of the case, as to which he will be delivering a separate judgment.

This is an appeal by the liquidators in the winding up of United Railways of Havana and Regla Warehouses Ltd. (a company incorporated in England in the year 1898 and hereinafter called " the company ") from an order of Wynn-Parry J., dated

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[51] [1954] 1 W.L.R. 1108, 1114.

[52] [1898] A.C. 349.

[53] [1958] 2 Q.B. 59.

[54] 45 T.L.R. 468.

[55] [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947.

[56] [1954] A.C. 495.

November 19, 1957, to the effect that a proof of debt lodged on behalf of the trustee for the holders of an issue of certificates known as " United Railways of Havana 15-year 7½ per cent. " Equipment Trust Certificates " should be admitted for a sum to be computed in the manner described in such order.

The present trustee for the holders of these certificates and respondent in this appeal is the First Pennsylvania Banking and Trust Co., a corporation of the Commonwealth of Pennsylvania in the United States of America, and is the successor in office of the Commercial Trust Co. of Philadelphia, another Pennsylvanian corporation which was the original trustee. References in this judgment to " the trustees " are to be understood as meaning the original trustee or its successor as the context may require.

Wynn-Parry J.'s full and careful survey of the documents, acts and events leading up to the present dispute enables us to go straight to the points at issue in this troublesome case, referring to particular facts and documents as and when relevant to the matter under discussion.

The basic question in the case is whether at the commencement of the voluntary winding up of the company on March 4, 1954, the company was indebted to the trustee under the covenant by the company for the payment of rentals contained in the lease of April 18, 1921, of the rolling stock by the car company to the company, the benefit of which was assigned by the car company to the trustee under the trust agreement of even date.

If this question fell to be determined according to English law, it would admit of only one answer. According to the express terms of the covenant the company was bound to pay the stipulated rentals, and it was not in dispute that such rentals were in fact in arrear and unpaid, as to the interest element since August 14, 1934, and, as to the element representing instalments of capital, from and including the instalment due on February 14, 1931, down to and including the final instalment due on February 14, 1936, a total of eleven half-yearly instalments in all.

It is no doubt true that the trustee could not in the end be entitled to any greater sum than was required to give full effect to the rights of the holders of the 331 outstanding certificates plus any sum properly allowable for its expenses, and, if it in fact received more than the amount so required, would have to account for the surplus to the liquidators. It is also true that this necessary limitation, coupled with questions as to the rates of exchange from dollars to pounds appropriate to the calculation, might well leave room for argument as to the proper way of quantifying the amount for which the trustee could prove in the winding up in respect of this indebtedness; but there could be no doubt whatever that it was a provable debt.

Mr. Megaw, for the liquidators, did in fact raise a subsidiary argument of some weight as to the quantum of the trustee's proof, to which we will later return, but according to his submission this question does not arise, for the simple reason that the right to receive and obligation to pay the debt outstanding under the lease was governed by the law of Cuba either (a) because the situs of the debt was in Cuba, or (b) because the proper law of the contract constituted by the lease was Cuban law. If he was right in claiming the application of Cuban law to the debt on either of these grounds, it followed, according to his argument, that under Cuban law the sale of the company's undertaking to the Cuban State on December 1, 1953, had the effect of transferring the liability for the debt from the company to the Cuban State, or, in other words, brought about a compulsory novation by virtue of which the trustee was compelled to accept the Cuban State as its debtor in lieu of the company.

We propose to begin by examining this argument on the assumption that Cuban law was on one or other of the grounds above stated applicable to this debt. The question then is, whether on that assumption the sale to the Cuban State did, according to Cuban law, have the effect of bringing about the compulsory novation for which Mr. Megaw has contended. [His Lordship considered the evidence of Cuban law, and continued:] On this part of the case, that is to say, the question whether, assuming Cuban law to be applicable, there was a compulsory novation in respect of the debts of the company for which the Cuban State assumed liability according to the terms of the sale of December 1, 1953, we find ourselves in complete agreement with the view taken by the judge.[1] We think there was no more than an agreement between the company and the Cuban State to the effect that as between those two parties the State should discharge the liabilities referred to and indemnify the company in respect thereof, leaving wholly unaffected the rights of the creditors concerned against the company.

[His Lordship then considered points of Cuban law which by reason of that conclusion were irrelevant, and continued:] As we reject the appellants' submission that in Cuban law their liability

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[1] [1958] Ch. 724, 760.

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under the lease was transferred away from the company to the Cuban State by compulsory novation, Mr. Megaw's further argument, which would have become relevant on the contrary assumption, that novation depends on the lex situs of the debt, and that the situs of the debt now in question was Cuban, does not really arise. We will, however, express our views upon it, for the question whether the lex situs applies is an important one, and considerable argument was addressed to us upon it by counsel on both sides.

Mr. Megaw's first proposition on this subject was that where a question of statutory novation of a debt arises, then, whether the novation results in the substitution of a new creditor for the original creditor or of a new debtor for the original debtor, our law will look and look only to the law of the situs of the debt at the date of the relevant foreign legislation. If, on the other hand, no case of novation arises but only a question of modifying a debtor's obligation under a contract, then our courts will look to the proper law of the contract and not to the lex situs of the debt. A novation of a debt, says Mr. Megaw, involves one single juridical act, and the question whether that act is effectual so as to bind the creditor is to be determined by reference to the lex situs.

Mr. Wilberforce, on the other hand, submitted that novation comprises two distinct elements, viz., the annulment of one debt and the creation of a substituted debt in its place. This difference of approach to the question which is involved in the respective contentions appears to us to be vital and should be considered at the outset. Mr. Wilberforce's view is supported by Anson on Contracts, 20th ed., where it is stated (at p. 263): "A liability "may be assigned with the consent of the party entitled; but "this is in effect the rescission of one contract and the substitu-"tion of a new one in which the same acts are to be performed "by different parties. This is called a novation and it can only "take place by agreement between the parties; novation cannot "be compulsory."

In Wolff's Private International Law, 2nd ed., p. 458, the following propositions are stated: "The substitution of one debtor "for another is treated either as a novation, that is, an extinction "of an existing debt by the creation of a new one, or as a true "succession into an obligation which remains in force. The first "method, developed on the basis of Roman law, is to be found "in English and French municipal laws; the second method "prevails in German law and has been adopted in the legal "systems of Austria, Switzerland and Poland. In both cases "the question whether the old debtor is discharged by the entry "of a new debtor depends on the proper law of the debt. But "whether the entry of a new debtor has taken place must be "determined by the law with which that entry is most closely "connected; this may be the new debtor's personal law or the law "of his place of business, unless he and the creditor have agreed "on a particular legal system."

No express judicial authority was cited to us in support of Mr. Wilberforce's suggested dichotomy, but in our view it is right in principle. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition upon the creditor of a substituted debtor. It follows from this that although the elements of a statutory novation may, and usually will, be comprised in one statute or decree and, for practical purposes, operate simultaneously, each has nevertheless a separate and distinct legal identity.

If this view be right, the next question is whether both of the elements to which we have referred are regarded by our courts as governed by the lex situs of the debt; for if even one of them is governed by some other law, and, in particular, by the proper law of the contract, Mr. Megaw's proposition cannot be supported.

Is, then, the first part of a novation, namely, the discharge of a debtor from a contractual liability to pay money, governed by the lex situs (which will normally be the place of the debtor's residence), or by some other, and, if so, what, system of law?

Rule 155 in Dicey's Conflict of Laws, 7th ed., p. 804, is in the following terms: "The validity of the discharge of a contract "(otherwise than by bankruptcy) normally depends upon the "proper law of the contract. (1) A discharge in accordance with "the proper law of the contract is valid. (2) A discharge not in "accordance with the proper law of the contract is not valid."

In the discussion on this rule (ibid., p. 807), the author states: "A contractual debt may, and normally will, be regarded "as 'situate' at the debtor's place of residence, but the discharge "of a debt, whether by performance or through other events, is a "matter subject not to the lex situs of the debt but to the proper "law of the contract from which it arises."

This comment, and rule 155 itself, seem to be amply supported by authority. Thus, in *Perry* v. *Equitable Life Assurance Society of the United States of America* [2] the plaintiff sued in this country upon an insurance policy which had been issued under a contract whereof the proper law was Russian. The rights under the contract had been annulled by Russian legislation, and Branson J., giving effect to the proper law, was constrained to dismiss the action. It is true that in that case the date for payment under the policy had not yet arrived when the Russian legislation took effect. We agree, however, with Wynn-Parry J. in his refusal to apply one principle to a contractual obligation to make a future payment and another to a contractual debt presently due.

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[2] (1929) 45 T.L.R. 468.

In our judgment, Dicey's rule 155 applies to a debt which has accrued due under a contract equally with a contractual obligation to make a payment in futuro.

This, as it appears to us, is sufficiently shown by the decision of this court (stated in detail by Wynn-Parry J. in his judgment) in *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux.*[3] That decision was approved by the Privy Council in *New Zealand Loan and Mercantile Agency Co. Ltd.* v. *Morrison,*[4] in which it was held that as the Joint Stock Companies Arrangement Act, 1870, did not apply to the colonies, a scheme of arrangement sanctioned thereunder by an English court could not be pleaded by the company concerned in a Victoria court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim. *Antony Gibbs & Sons'* case[5] was also referred to with approval, but distinguished, by Viscount Simonds in *National Bank of Greece and Athens S.A.* v. *Metliss.*[6] It accordingly appears to us that the view which we have expressed, that the question whether a debtor has been discharged from his liability depends on the proper law of the contract, is sufficient in itself to dispose of Mr. Megaw's contention that novation depends on the lex situs; for, on the dichotomy of novation, which we accept, the first limb (viz., the discharge of the debtor) depends upon the proper law of the contract, and Mr. Megaw cannot succeed unless the lex situs applies both to the first limb and to the second.

In the course of his argument on this question, however, he sought to rely on the cases in which resort has been had to the lex situs of a debt where the title to the debt has been in question, that is to say, where under the lex situs the rights of the creditor have been transferred away from him to another. There have been a number of such cases and most of them were considered and analysed by Wynn-Parry J. so fully in the course of his judgment that little is to be gained by referring to them again in this judgment. We should, however, refer shortly to one of the most recent cases on this subject, namely, *Arab Bank Ltd.* v. *Barclays Bank* (*Dominion, Colonial and Overseas*).[7]

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[3] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.

[4] [1898] A.C. 349.

[5] 25 Q.B.D. 399.

[6] [1958] A.C. 509, 523; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

In that case the Arab Bank had a credit balance on the current account with the respondent bank's branch in Jerusalem. The British Mandate over Palestine expired at midnight on May 14, 1948, and thereupon the Provisional Council of State and Provisional Government of the State of Israel were constituted. War broke out between Israel and the Arab States, which rendered the further performance of the contract of current account impossible. From the date of the termination of the Mandate the appellant Bank's premises were situate in Arab-controlled territory and the respondent bank's premises were situate in Israel territory. By legislation the State of Israel vested in an official called "the "Custodian of the Property of Absentees," the property in the State of Israel belonging to a class of persons and corporations which included the Arab Bank. The respondents paid the appellants' credit balance, amounting to some £583,000, to the custodian. In 1950 the appellants sued the respondents for this sum. Parker J., this court, and the House of Lords, dismissed the action on the ground that the right to be paid the credit balance, being locally situate in Israel, became subject to the legislation of that State and vested in the custodian and was not recoverable by the Arab Bank from the respondent bank. In the course of his speech Lord Morton of Henryton said[8] that the Arab Bank's right to be paid their credit balance on current account was "suspended, and not destroyed, by the outbreak of "war, and immediately after the outbreak of war it was locally "situate in the newly created State of Israel. Thus it became "subject to the legislation of that State, was vested in the "custodian, and was rightly paid to the custodian by the "respondents."

Mr. Megaw contended that if, as the *Arab Bank* case[9] and other cases show, the lex situs is regarded by our courts as decisive when, under that law, the rights of a creditor are compulsorily transferred to another, the same result should follow where one debtor is compulsorily substituted for another. It

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[7] [1954] A.C. 495; [1954] 2 W.L.R. 1022; [1954] 2 All E.R. 226.

[8] [1954] A.C. 495, 529.

[9] [1954] A.C. 495.

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appears to us, however, that there is no true analogy between the two cases. The contractual right to receive payment of a debt is an item of property, that is to say, a chose in action. It can be transferred by the creditor to a third party, but the validity of the transfer necessarily depends upon the lex situs, because the courts of the country where the debt is have jurisdiction over the title to it. Novation, on the other hand, does not involve the transfer of any property at all, for, as we have already pointed out, it comprises the annulment of one debt and the creation of another. Moreover, in novation a creditor may be vitally prejudiced, whereas it is immaterial to a debtor to whom he pays his debt provided that he gets a good discharge for it. Accordingly, we are unable to accept the suggested application, by analogy, of such cases as the *Arab Bank* case [10] to the present.

The only authority which Mr. Megaw was able to draw to our attention in favour of the proposition that the lex situs governs questions of statutory novation is a passage in the judgment of Maugham J. in *In re Russian Bank for Foreign Trade.*[11] In that case a petition to wind up the Russian Bank was presented under section 338 of the Companies Act, 1929, by a person who claimed to be a creditor thereof. For present purposes it is sufficient to say that the evidence on the petition proved that Russian legislation in 1917 and later had transferred the Russian Bank's assets and liabilities to the Soviet Government, and that payment could not be demanded from any other person or body of persons; and that the result of the legislation was to put an end to the juristic existence of banking companies incorporated in Russia, including those which (like the Russian Bank) had branches established in England. The relevant Soviet legislation was described by Maugham J. as being "of a confiscatory "character." [12] The judge, after holding that he had jurisdiction to wind up the bank under section 338 whether or not it had been dissolved or had completely ceased to exist as a company under the laws of Russia, proceeded to consider the position of the petitioner. That gentleman claimed to be a creditor of the bank for some £23,000 representing proceeds of sale of goods sold by the London branch of the bank on his behalf from time to time and not yet paid for. The debt was disputed, and in the course of considering the matter Maugham J. said [13] that there was "a real question in dispute, and that is whether the debt to the

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[10] [1954] A.C. 495.

[11] [1933] Ch. 745; 49 T.L.R. 253.

[12] [1933] Ch. 745, 763.

[13] Ibid. 766.

"petitioner was or was not locally situate in Russia at the date "of the decrees of 1917 and 1918 above referred to. If it was "locally situate in Russia, it seems to me that as the effect of the "legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the "Soviet State. By the decree of December, 1917, the assets "and liabilities of the bank within Soviet territory were taken "over by the People's Bank, and this, in my opinion, involves the "destruction of the original debt and a kind of statutory novation "(in some sense, perhaps, only a theoretical one) whereby the "State Bank became liable to discharge it."

Mr. Megaw, in the present case, has, not unnaturally, fastened upon Maugham J.'s reference to statutory novation, and submits that the judge was treating the jus situs of the debt as governing the novation. As appears from the report, the evidence did not satisfy the judge whether the petitioner was a creditor for a debt payable by the Archangel branch of the bank or was a creditor for a debt payable in London. As, however, there were creditors supporting the petition whose debts were locally situate in England, he did not regard this as being a sufficient objection in itself to a winding-up order being made, and he accordingly made such an order, being well satisfied that it was just and equitable so to do.

It is quite true that Maugham J. does seem to have regarded the Russian law, confiscatory in character though it was, as effective in so far as it annulled the claims of creditors whose debts were payable in Russia and transferred the liabilities to the Soviet Government. It does not appear, however, to have been suggested in argument before him that it was in any way relevant to look to the proper law of the contract in order to ascertain whether the legislative annulment of the bank's liabilities operated as a discharge which was binding on its creditors. It seems to have been assumed on all hands that the lex situs of the bank's debts controlled the creditors' rights and the only question (on this point) which was argued was whether the petitioning creditor's debt—which was, in any case, disputed—was situate in Russia or in England. Moreover, the issue was of subsidiary importance against the background of the far wider question whether, in the highly complex circumstances of the case, the court could and should order the Bank to be wound up and thus undertake the distribution of such assets as came under its control. We cannot, at all events, regard the observations of the judge on which Mr. Megaw relies as constituting an authoritative pronouncement that the novation of a debt, brought about by State intervention, is binding upon the creditor, whatever may be the proper law of the contract, by virtue of the lex situs of the debt and that alone.

Maugham J.'s observations above quoted, were referred to by Vaisey J. in *In re Banque des Marchands de Moscou* [14] and by Roxburgh J. in *In re Banque des Marchands de Moscou* (*No. 2*),[15] but in neither of these cases was it relevant to inquire whether the claim of creditors who sought in each case to prove in the liquidation of the Banque de Moscou was defeated by Russian law operating as the proper law of the contract or operating as the lex situs of the debt—though in fact Vaisey J. resorted to the proper law of the contract as being the appropriate law to consider. In any event, it seems to us that the *Russian Bank* cases, involving as they did the winding up of foreign organisations already dissolved by their own domestic laws and a consideration of the rights of various types of creditors to prove in liquidations carried out in this country, were cases of so special a character as to afford little guidance in the elucidation and application of principles of private international law in general. As already indicated, we do not think that the novation of debts is a matter to be determined solely by reference to the lex situs, and we respectfully adopt the conclusion of Wynn-Parry J. upon the subject, which he expressed as follows [16]: "In this state of the authorities I come to the conclusion that "the proposition contended for by Mr. Megaw is not established "as a rule of English private international law. To my mind "it would offend against both principle and considerations of "convenience. It must be remembered that, as Dr. Cheshire "says (Private International Law, 5th ed., p. 246) 'discharge "'affects the substance of the obligation,' whereas questions of "title to and assignment of the benefit or burden"—the words "or burden" obviously slipped in per incuriam—"of the "obligation do not. Every contract has a proper law; it is the "law which the parties either expressly or impliedly have chosen "to govern their contractual relations. One of the most "important aspects of any contract is the manner in which it "is to be discharged, and one would suppose that the parties "would intend the law which they have chosen as the proper "law to govern that important matter—discharge."

[14] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[15] [1954] 1 W.L.R. 1108; [1954] 2 All E.R. 746.

[16] [1958] Ch. 724, 756.

If we are right in accepting the view that, upon analysis, novation comprises two features and that the first (the discharge of the debtor) is controlled by the proper law of the contract, Mr. Megaw's proposition cannot succeed and it is immaterial whether the second feature (the substitution of a new debtor) depends on the lex situs or upon some other law. In these circumstances we prefer to express no concluded opinion upon that question. There is obviously, however, much to be said for the view expressed in Wolff's Private International Law (supra) that the question should be determined by the law with which the entry of the debtor is most closely connected and that, in the absence of some agreement to the contrary, such law might be the new debtor's personal law or the law of his place of business.

As ancillary to Mr. Megaw's submissions as to the lex situs it was, of course, necessary for him to establish that the liabilities which are in question in the present case were, in 1953, situate in Cuba. Inasmuch as we have been unable to accept Mr. Megaw's main submission, and in any event are of opinion, as already indicated, that no novation was effected by the relevant Cuban legislation, the question of the locality of the company's debt becomes wholly academic; and we think it unnecessary to burden this judgment with a consideration of it.

We now turn to the question of what was the proper law of the lease. This would be relevant to the issue of novation had we accepted the appellants' contention as to the novationary effect of the legislation upon which the contention was founded. The question is, however, also directly relevant to the issues which arise out of the moratorium legislation in Cuba which we consider hereafter; for if, as the respondents contend and as the judge held, the proper law of the lease was Pennsylvanian, the appellants cannot, as they concede, rely upon the moratorium legislation.

In an inquiry as to what is the proper law of a contract in which the parties have not expressed their own selection of the law to be applied, many matters have to be taken into consideration. Of these, the principal are the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject-matter of the contract (Dicey, pp. 719, 720, citing Falconbridge, Selected Essays on The Conflict of Laws, 2nd ed., p. 378). But, as the editor points out, the most satisfactory formulation is that the proper law is the one "with which the transaction has its "closest and most real connection" (*per* Viscount Simonds in

Bonython v. *Commonwealth of Australia*[17]). "The country in "which [the contract's] elements are most densely grouped will "represent its natural seat and the law to which in consequence "it belongs. It may have factual links with several countries, "each of which has some claim to be considered. . . . In most "cases, however, an examination of these connecting ties will "disclose without undue difficulty the country with which the "contract is in fact most closely connected and in which it has "its natural seat and centre of gravity." (Cheshire's Private International Law, 5th ed., p. 207.)

It is further to be observed that the fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole (*Hamlyn & Co.* v. *Talisker Distillery*[18]). Different parts of a contract may be governed by different laws, though "the courts of this country will not split the contract ". . . readily and without good reason" (*per* Lord MacDermott in *Kahler* v. *Midland Bank Ltd.*[19]).

Wynn-Parry J. held that the proper law of the lease was Pennsylvanian, and the appellants have not persuaded us that he was wrong. It seems reasonably clear to us that the trust agreement between the rolling stock company and the commercial trust company was not intended by the parties to be governed by Cuban law. Both parties to the agreement were American corporations. Under the agreement the trust company were to issue to the rolling stock company $6 million equipment trust certificates and the latter company were to transfer to the trust company the lease and all its right, title and interest in and to the rolling stock. The trust company were to hold the rights and interests so transferred as trustee for the holders of the certificates. The certificates were to be retired not later than February 15, 1936, upon surrender thereof at the trust company's office in the City of Philadelphia, and in the meantime dividends would be payable in New York. Par value of the certificates, premium and dividends were to be payable in gold coin of the United States of America of 1921 standard of weight and fineness out of the rentals received under the lease. The trust company was to keep at its office in Philadelphia a register in which the holders of certificates might have the same registered.

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[17] [1951] A.C. 201, 219.

[18] [1894] A.C. 202.

[19] [1950] A.C. 24, 42; 65 T.L.R. 663; [1949] 2 All E.R. 621.

Pausing there, it could scarcely be doubted but that the agreement was essentially an American, and not a Cuban, contract, especially when it is remembered that in 1921, at all events, trusts such as that which was created by the agreement were virtually unrecognised by the domestic law of Cuba. There follow, however, in the agreement certain provisions which were to take effect in the event of the railway company defaulting in payment of the rentals reserved in the lease and, for relevant purposes, clause seventh is the most important. It is in the following terms: [His Lordship read it and continued:] Inasmuch as the rolling stock, which was to be the security for the certificate holders, was situate in Cuba, it is clear that events might well arise which would render resort to the Cuban courts by someone who was qualified to apply to them both necessary and desirable in the event of default by the railway company. That, however, is to our minds quite insufficient ground for attributing to these American contracting parties an intention that the trust agreement as a whole should be governed by Cuban law. So also with clauses eleventh and twelfth on which the appellants relied. These are as follows: "Eleventh. It is "the intention of the parties to this agreement to enter into and "execute this agreement in accordance with the provisions of "the laws of the Republic of Cuba to the end that this agreement "may be deposited, filed, and/or registered thereunder, and the "Car Company agrees to so deposit, file and/or register the same "and to record the same in such States or Territories of the "United States as may be required by law. Twelfth. In order "to facilitate the filing and/or registering of this agreement, the "same may be simultaneously executed in several counterparts, "each of which so executed shall be deemed to be the original, "and such counterparts shall together constitute but one and "the same instrument. In case it becomes necessary that this "agreement be translated into the Spanish language in order "that it may be filed and/or registered in the proper offices in "the Republic of Cuba, then and in that event it is understood "and agreed that the English text shall govern in case of any "conflict between the English and Spanish texts."

We read these clauses as designed to ensure that the formal execution of the agreement should be in accordance with Cuban law and be registrable thereunder accordingly. No further or other significance can, in our judgment, be fairly attributed to them.

In our opinion, therefore, except to the limited extent to which the law and courts of Cuba were invoked for the purpose of clauses seventh and eleventh, the proper law of the agreement cannot be regarded as Cuban. Mr. Megaw says that if the parties had intended the proper law to be American they would have indicated whether they had in mind the law of some particular State, that is, Pennsylvania, New York or (possibly) Delaware, in which the rolling stock company was domiciled. As to this, however, we think that Delaware can be safely ruled out and New York only comes into the picture as being the place designated for payment of the interest on the certificates. We accordingly agree with the judge in thinking that the proper law to be attributed by the court to this agreement was that of Pennsylvania but not, at all events, that of Cuba.

It has been material to consider the agreement in this connection because it was held by the judge, and argued before us by counsel for the respondents, that the proper law of the agreement and of the lease was intended to be the same. This is probably, though not, we think, inevitably, true. In the words of the judge [20]: " The lease is expressly recited in the agreement, " and in the lease there is a recital of the intention immediately " to assign the benefit of the lease to the trustee. The two " documents are essential parts of the same transaction, namely, " the Philadelphia Plan. In those circumstances one would " expect that they would each have the same proper law, " and I hold that they have." One certainly cannot ignore the fact that each of the two documents constituted essential parts of one entire transaction and it would, we think, be unusual if the parties concerned in that transaction should desire one part to be governed by the law of Cuba (which is in many relevant respects totally different from American law) and the other part to be governed by the law of Pennsylvania. It is, however, necessary to consider the provisions and objects of the lease. [His Lordship read the relevant provisions of the lease, and continued:] On the terms of the lease, then, read in conjunction with those of the trust agreement, with which it was associated, what was the proper law which the parties intended, or must be deemed to have intended, should govern its performance? What was the country with which it had " its closest " and most real connection," the country " in which it had its " natural seat and centre of gravity "?

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[20] [1958] Ch. 724, 757.

Mr. Megaw, in contending that that country was Cuba, relied on the reference in clause seventh to "any court having jurisdiction in the premises" and suggested that that reference was to the courts of Cuba and foreshadowed clause twelfth of the lease. He further submitted that the subject-matter of the lease was rolling stock in Cuba or to be delivered there; the payments reserved were expressed to be rentals deriving from the operation of the company in Cuba, and, on default, the certificate holders' security, that is, the rights and interests in the rolling stock, could only be enforced in Cuba; that practically the whole of the lease was concerned with the preservation of this security and the protection of the trustee's title to it in Cuba; that clauses eleventh and twelfth are entirely comprehensive in their scope and indicate a rejection of all law in relation to the lease other than Cuban; and, finally, in this connection also, he relied on the contention, already mentioned, that if the parties had American law in mind, they would surely have indicated some particular State (a point with which we have sufficiently dealt already).

On the other hand, Mr. Wilberforce submitted that the lease and the trust agreement, which were executed on the same day, were both parts of the so-called Philadelphia Plan, which was purely a financial transaction embodying provisions for a loan and for the repayment thereof; that the lease, which constituted a security but not a mortgage for the repayment of the loan, was merely a convenient piece of mechanism; that the Philadelphia Plan was wholly foreign to the law of Cuba; that all payments under the lease were to be in United States of America gold coin and payable in the United States to a trustee resident in that country; that surely the parties could not have intended that questions which might well arise from some alteration in the American gold clause legislation or as to the remuneration and expenses of the trustee and the like should be dealt with by the Cuban courts in accordance with Cuban law. Mr. Wilberforce presented the entire transaction (of which the lease formed an ingredient) as an essentially American (Pennsylvanian) transaction with a Cuban element in it. Clauses seventh, eleventh and twelfth of the lease were introduced, he submitted, because of the presence of this element but are insufficient to transform what was an obviously American contract into a Cuban one, so that all of the contractual obligations should be governed by Cuban law.

In our opinion the respondents' contention on this matter is preferable to that of the appellants. It does not seem to us that

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the effect of clause 7 of the trust agreement, or of clauses seventh, eleventh or twelfth of the lease, is to attract the operation of Cuban law to the lease except for limited purposes. In our judgment the words "to the end that" limit the scope of clause eleventh of the lease just as it limited the scope of clause eleventh of the trust agreement, save that the clause in the lease extends also to the performance under Cuban law of such acts as might be required to protect the trustee's title. Similarly, in clause twelfth of the lease, the submission to the jurisdiction of the tribunals of the city of Havana is, significantly, for the purpose of "notifications" and specified "formalities." In view of these purposes, expressly described, it seems to us difficult in the extreme to suppose that the parties were intending to submit themselves to the law of Cuba for all the purposes of the lease —"expressio unius exclusio alterius est." And as to clause seventh the reference to "specific performance" is a strong reminder of the principles of equity for so long known and applied by our courts and those of the United States.

We accept, without repeating them, the reasons advanced by Mr. Wilberforce for the view that although the lease, as also the trust agreement, was intended in some of its aspects to be governed by the law of Cuba, nevertheless the proper law of the contract as a whole, the general law which was to govern its performance, was not that of Cuba but the law of Pennsylvania or (possibly) of Philadelphia. In our opinion there is ample justification, dictated by the nature of the transaction and by the terms of the trust agreement and the lease, for holding that both these documents are severable in relation to the law which governs their performance; and that while Cuban law was clearly intended to be applicable to certain aspects of the agreement and the lease, nevertheless the proper law of both these contractual documents was that of Pennsylvania or Philadelphia.

While accepting the respondents' contention that the proper law of the trust agreement and of the lease was not the law of Cuba we are not prepared, as at present advised, to accept their alternative suggestion that had the proper law been Cuban the relevant law to apply would nevertheless, on the evidence of Dr. Gorrin and by virtue of the renvoi doctrine, have been that of Pennsylvania. This view does seem to have been accepted by the judge and receives some support from the judgment of the Privy Council, delivered by Lord Wright, in *Vita Food Products*

Inc. v. *Unus Shipping Co.*[21] This passage from the judgment of the Judicial Committee has, however, by no means escaped criticism (see, for example, Dicey, pp. 73 and 721; and an article in vol. 56 of the Law Quarterly Review (1940), pp. 333 to 335, by Mr. Morris and Dr. Cheshire). Had it been necessary to decide the point on the present appeal (which it is not), we should have been disposed to hold that the principle of renvoi finds no place in the field of contract; and accordingly that if the parties to the lease here in question ought to be treated as having accepted Cuban law as the proper law of the contract, such law was the domestic law of Cuba and not the rules of the conflict of laws administered by the Cuban courts.

A good deal of evidence at the trial, and considerable argument before us, was devoted to the question whether under Cuban law the rolling stock, while in use on the railway, was to be considered as real property or personal property. In the view which we take, this question is of no great relevance, but in case we are wrong as to that, we think it proper to set out the conclusions at which we have arrived. The judge stated: "Mr. Megaw put "forward this question as being relevant on three points: first, "as helping to establish that the liabilities of the company in "regard to the lease are liabilities situate in Cuba for the purposes "of clause fourth (B) of the preliminary agreement: secondly, "as a factor to be taken into account in determining the proper "law of the lease: and, thirdly, for the purpose of throwing light "on the question whether or not under Cuban law there had been "an effective transfer of the ownership of the rolling stock to the "trustee."

It appears to us that with regard to the first two points it matters not whether the rolling stock did or did not have the character of real property. The essential fact was that it was at all material times physically situated in Cuba. With regard to the third point, for reasons which will appear hereafter, we are satisfied that the trust agreement was effective to transfer the ownership of the rolling stock to the trustee, and our conclusion on this point would be the same whether or not, at the time of the agreement, the rolling stock had the character of real property.

It was contended by Mr. Megaw, and not challenged by Mr. Wilberforce, that in order to determine whether the rolling stock was real or personal property it is necessary to look to the domestic law of the place where it was situated, that is, Cuba. [His Lordship reviewed the evidence on this point and continued:] On this point, therefore, if it is of any relevance, our conclusion is in favour of the trustee. At all material times after April 10, 1921, the rolling stock must in our judgment be regarded as having, under Cuban law, the character of personal property.

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[21] [1939] A.C. 277, 292.

As relevant to the issues of conversion and breach of contract which we consider hereafter, the appellants submitted that, whatever may have been the intention of the parties to the trust agreement and their subsequent belief as to its effect, that document was wholly ineffective to pass any title at all in the railway equipment from the rolling stock company to the trustee. The appellants admit that by virtue of the trust agreement the trustee became entitled to the benefit of the railway company's covenants in the lease but deny that they acquired any title to the rolling stock itself. [His Lordship having considered the evidence of Cuban law on this point, concluded that the trust agreement was valid in Cuban law to pass the rolling stock company's title in the rolling stock to the trustee and continued:] In the light of this conclusion it is now necessary to consider the alternative claims put forward on behalf of the trustee on the basis of conversion and breach of covenant. We approach this question on the footing that, whatever law is applicable, the trustee, by virtue of the trust agreement, obtained a good title to the rolling stock. This could not in our judgment be affected in any way by the subsequent re-sale agreement of April 27, 1922, whereby the rolling stock company purported to sell the rolling stock to the company. From the date of the lease the company must be regarded as remaining in possession of the rolling stock as bailees from the trustee. In such circumstances we entertain no doubt that the transfer of the rolling stock to the Cuban State, in pursuance of the agreement of December 1, 1953, was prima facie an act of conversion. If the lease were to be regarded as still in force it was plainly contrary to the terms thereof. If the lease be regarded as no longer in force after February, 1936, there is still no ground upon which the transfer of the rolling stock could be justified. We accept that in order to be actionable as a tort in this country the act complained of must be an act not justifiable according to the law of the foreign country where it was done, that is, Cuba: see Dicey, 7th ed., rule 181, at p. 940. But in this connection we accept evidence that the transfer of the rolling stock to the Cuban State was an act unjustifiable under Cuban law.

It was contended by Mr. Megaw, and we accept, that an action for conversion will not lie unless the plaintiff can show an immediate right to possession of the chattels in question. It was argued that in this case the trustee could never, at any material time, obtain possession of the rolling stock, because such rights as he had were at all times subject to the limitations imposed by Military Order No. 34 of 1902, particularly Chapter XV thereof. But in our judgment there is no substance in this argument. The purpose of Chapter XV of the Military Order, as plainly appears from paragraph 1 thereof, was to prevent the interruption of the public services afforded by a railroad which might occur if its equipment were subject to the ordinary processes of execution. It was therefore provided that, in the event of a creditor obtaining judgment against a railroad corporation, the court should appoint a judicial administrator or receiver charged with the duty of temporarily administering the railroad and paying the judgment debt out of the net earnings. It appears to us that this provision of Cuban law has no relevance to the question of the trustee's right to possession. It is, no doubt, true that Cuban domestic law might well interfere, to some extent, with the free exercise of the trustee's right to possession, in the same way as the company's own possession of the rolling stock was subject to the limitations imposed by Cuban law. But this could not in our view affect the rights of the trustee and the company inter se. As against the company the trustee was at all material times immediately entitled to such possession as the company itself had.

A further objection taken by Mr. Megaw was that, assuming the ownership of the rolling stock remained throughout in the trustee, it was, by the express terms of clause twenty-ninth, excluded from the operation of the sale agreement of December 1, 1953. On this argument the rolling stock never was sold to the Cuban State, and consequently, there never was any conversion, the trustee being just as free now to exercise its right to possession as it was before the agreement. In our view this contention is wholly without merit, since one thing which is clear is that the effect of the agreement was de facto to transfer the rolling stock to the Cuban State as part of the consideration for the price of $13,000,000 paid by the State.

Assuming a case of conversion to be made out, as in our judgment it has been, Mr. Megaw next contended that the damages in respect thereof could only be nominal. In our view, there is possibly some force in this contention, and for this reason. One result of the act of conversion complained of was to bring into the hands of the company a fund of $13,000,000 against which the trustee became entitled to assert a claim, as it is in effect now doing. It is, therefore, in a better position than it was before December 1, 1953, when, owing to the operation of Military Order No. 34 and to the appointment of the interventor, it had no effective means of enforcing its rights or of obtaining payment of the outstanding debt. It is, however, unnecessary for us to express a concluded opinion about this, for in our view the whole of the protracted discussion as to the measure of damages to which we listened was entirely academic. Assuming, for the sake of argument, that Mr. Wilberforce was well founded in contending that the measure of damages for conversion would be the amount which the company would have had to pay on December 1, 1953, in order to make itself the owner of the rolling stock—that is, the total of the outstanding instalments plus its own expenses to date—it was conceded that the trustee would only be entitled to retain, out of that very considerable sum, such an amount as would be sufficient to discharge the 331 outstanding certificates remaining in its hands and to cover its own expenses. This is the very same amount for which, for reasons hereafter stated, the trustee is, in our judgment, entitled to prove under the first head of its claim. For this purpose it does not matter whether that amount be calculated in accordance with the method adopted by the judge and contended for by Mr. Wilberforce, or in accordance with the alternative method suggested by Mr. Megaw. It follows, therefore, that the addition of a claim for conversion could not in any event affect the total of the amount in respect of which the trustee is entitled to prove.

Much the same considerations apply in our view to the further alternative claim for damages for breach of covenant, which equally appears to us to raise questions of wholly academic interest. It is at least open to doubt whether the covenant relied on, namely, that contained in clause fifth of the lease, could have survived the expiry of the lease in February, 1936. This may depend upon the question whether the proper law of the contract was Pennsylvanian or Cuban. If Cuban law applies, the evidence was that the lease must be regarded as surviving. There was no evidence as to Pennsylvanian law on this subject, and accordingly, if the proper law of the contract was Pennsylvanian, it would be necessary, in the absence of evidence as to the foreign law, to apply English law. No English authority was cited to us to show that the doctrine of holding over applies in the case of a lease of chattels. Mr.

Wilberforce, however, referred us to *Wedd* v. *Porter*,[22] which arose out of the lease of a farm, and contended that, on the analogy of that case, the covenant contained in paragraph 5 of the lease should be regarded as continuing in force as a matter of implied contract. If so, there could, in our view, be no room for doubt that the transfer of the rolling stock to the Cuban State by virtue of the agreement of December 1, 1953, would have constituted a breach of the covenant, seeing that the company thereby parted with the whole of its interest in the rolling stock.

It does not, however, appear to us to be necessary to reach any final conclusion upon this point. Assuming that the covenant in the lease is to be regarded as still in force at December 1, 1953, the breach of it by the transfer of the rolling stock to the Cuban State would not confer any additional right on the trustee. The trustee could no doubt elect whether to sue for breach of covenant or for conversion. But in no event could he have his remedy twice for what was, upon any view, a single actionable wrong. Exactly the same considerations with regard to the measure of damages would, in our judgment, apply whether the trustee's claim be based on breach of covenant or conversion. In neither event would the trustee be entitled to retain out of the damages more than would be sufficient to satisfy the proper claims of the 331 outstanding certificate holders together with its own expenses —the very sum for which, in our judgment, it is entitled to prove under the first head of its claim.

For these reasons the trustee's alternative claims based on conversion and breach of covenant in our judgment add nothing to the case, and need not be further considered.

If the proper law of the contract was Cuban, it becomes necessary to consider the application of Cuban moratorium laws, the effect of which, it is contended, would be to reduce to a very considerable extent the sum in respect of which the trustee is entitled to prove. [His Lordship considered the relevant Cuban law, and upheld the finding of Wynn-Parry J. that under Cuban law the liquidator could not in the present case claim the benefit of the moratorium laws, and continued:]

It remains to consider the question raised as to the quantum of the trustee's proof. Up to August 14, 1930, certificates to the nominal amount of $3,800,000 were duly redeemed, the nominal amount of certificates outstanding being thus reduced to $2,200,000. The company subsequently bought in, pursuant to

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[22] [1916] 2 K.B. 91.

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terms of compromise agreed in June, 1939, of proceedings brought against the company in Maine, U.S.A., further certificates to the nominal amount of $1,869,000 at $147.50 per certificate, so that the nominal amount of the certificates left outstanding in the hands of members of the public at the commencement of the winding up was $331,000.

The trustee's proof as lodged made claims under four heads tabulated in paragraph 2 as follows: [His Lordship read the paragraph, and continued:] It clearly appears from paragraph 5 that the claim in paragraph 2 (d) in respect of the $1,867,000 (sic) certificates was made as a precautionary measure, inasmuch as these certificates (which, be it remembered, were bearer documents) had not been physically surrendered to the trustee for cancellation, although the trustee had been advised that all rights under them had in fact been effectively extinguished. The figures in the proof are thrown out to some extent for the reason that the nominal value of the certificates ultimately left outstanding was taken as $333,000 instead of $331,000, the purchase by the company after default of the two further certificates (nominal value $2,000) having been overlooked. This has resulted in the total nominal value of the certificates bought in after default being put at $1,867,000 instead of the correct figure of $1,869,000, and in the nominal value of the outstanding certificates being overstated by $2,000 as above, with consequential errors in the calculation of premiums and interest. There is, however, no dispute as to the necessary corrections in the figures as such. The corrected total under paragraph 2 (a) of the proof is $734,971.89 instead of $739,412.81. A discrepancy of $1,000 in the total amount of the eleven unpaid instalments should also be noted. This was due to the fact that the first unpaid instalment was taken as $205,000 whereas it was actually $206,000. This has resulted in the total being understated by $1,000, but nothing of any consequence turns upon this relatively small error.

In paragraph 4 of the proof the liability of the company to the trustee in the sums claimed in paragraph 2 was assigned primarily to the covenant for payment of rentals contained in the lease, but such liability was stated in the alternative to arise by way of damages for breach of the covenant against assignment contained in the lease and in the further alternative by way of damages for conversion of the rolling stock by the company. In either of these alternatives the amount of damages recoverable by the trustee in the winding up would take the place of the rentals due under the lease as the fund available to the trustee for the purpose of satisfying the certificate holders' claims.

As appears from what we have said above, we think that the claim in conversion at all events has been made out but regard both these claims in damages as academic. Clearly the trustee could not recover damages under both heads, and would have to elect between them. It is also clear that on the footing that the trustee has, as we have held, established its right of proof for the rentals due under the lease, proof under that head would preclude the trustee from proving additionally for damages under either of the heads claimed. The trustee would thus, in effect, have to elect between proving under the lease and proving for damages under one or other of the heads claimed.

The liquidators having rejected the trustee's proof under all four heads of paragraph 2, the trustee appealed against such rejection by originating summons dated April 25, 1955. The matter came before Roxburgh J. on December 4, 1956, when the judge dealt only with head 2 (d) of the proof—that is, the claim for £1,480,570 5s. 7d. (a figure which requires correction to accord with the addition to the dollar figure of the two further certificates bought in) in respect of the $1,869,000 certificates bought in by the company after default. The immediate importance from the liquidators' point of view of defeating the appeal as regards the rejection of this head of proof was that if the claim in respect of the $1,869,000 certificates should be eliminated they would be in a position to show a clear surplus of assets over liabilities out of which an interim distribution could be made.

The material part of Roxburgh J.'s order of December 4, 1956, was in these terms: "And this court being satisfied that having "regard to the said exhibit T.W.39 referred to in the said affidavit "of William Robert Tomkinson and Robin Hereward Bruce "Wright filed November 1, 1956, the holders in due course of the "1,867 equipment trust certificates the denoting numbers whereof "are set forth in the schedule to this order have renounced any "claim to participate in the assets available for distribution in "the winding-up and that such renunciation alone is a sufficient "ground for the rejection of that part of the applicant's said "proof of debt (namely, the claim in respect of the sum of "£1,480,570 5s. 7d. claimed in subparagraph (*d*) of paragraph 2 "of the said proof of debt) which is based upon or measured by "reference to the said 1,867 equipment trust certificates Doth "not think fit to reverse or vary the decision of the respondents "as such liquidators rejecting the said proof of debt so far as the "same relates to the said sum of £1,480,570 5s. 7d. and Doth "make no order on that part of the said originating summons "accordingly."

The remainder of the summons was directed to stand over and was ultimately restored before Wynn-Parry J. who made upon it the order now under appeal. The effect of Roxburgh J.'s order of December 4, 1956, on the question of quantum has been the subject of considerable argument before us.

We should next refer to certain passages in the judgment of Wynn-Parry J. on this aspect of the case. The first passage is[23]: "Paragraph 2"—that should be 2 (*a*)—"of the proof seeks to "quantify the claim of the applicant as trustee in respect of "the last eleven instalments payable under clause First II of the "lease and the premium of 2½ per cent. on their face value and "interest. Paragraph 2 (*b*) quantifies a claim for reasonable "expenses under clause First I (*b*) of the lease. Paragraph 2 (*c*) "deals with a claim for expenses incurred or to be incurred by the "applicant as trustee since March 4, 1954. Paragraph 2 (*d*) "quantifies a claim in respect of the certificates of the face value "of $1,867,000 which had been purchased by the company. I "am not concerned with this claim, because any claim in respect "of these certificates was renounced, and on that basis Roxburgh "J. by an order of December 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of these "certificates."

The next passage is this[24]: "The amount for which the "trustee is entitled to prove should be ascertained as follows. "There must first be ascertained what is due to the trustee under "the lease. Expressed in dollars this consists of (1) sums due "under clause First I (*a*) and First II of the lease, and (2) what "upon inquiry shall be found to be the correct sum in dollars "under paragraph 2 (*b*) and (*c*) of the proof.

"As regards the premium of 2½ per cent. on the face value of "the certificates, this arises under the agreement and not under "the lease and should not be taken into account at this stage of "the calculation. Then the dollars must be converted into sterling. As regards principal, this represents eleven instalments of "rental, and so each instalment should be converted at the rate of "exchange obtaining when it fell due. As regards the first claim "for interest, this represents interest payable under the lease "and therefore payable half-yearly on February 14 and August

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[23] [1958] Ch. 724, 744.

[24] Ibid. 758, 759.

"14 of each year. Therefore, the total sum claimed under this "head should be broken down into half-yearly amounts and con-"verted at the rate of exchange obtaining on the respective dates "when each half-yearly payment should have been made. The "second claim for interest is really a claim for rent on the basis "of holding over. I think, therefore, that, for purposes of con-"version into sterling, the same method should be adopted as for "the first claim for interest. The sums making up what is found "to be the correct figure under paragraph 2 (*b*) must be con-"verted into sterling at the rate obtaining on the respective dates "of payment, while the sum found due under paragraph (*c*) must "be converted into sterling at the rate obtaining at the com-"mencement of the winding-up, namely, March 4, 1954.

"If, of course, any of the items comprised in subparagraph "(*b*) were incurred in sterling, there will be no need to convert "into dollars and then back to sterling.

"The sum resulting from the above calculation will represent "the sum for which the trustee is entitled to prove in the "liquidation. But, of course, as the trustee is a trustee, it can "only receive in respect of its proof a sum sufficient to satisfy "the proper claims of the certificate holders. In this regard I "think that Mr. Wilberforce is right in his submission that the "principle underlying the decision in *In re Chesterman's Trusts* [25] "applies. I do not see how otherwise to deal with the matter. "The proper course, therefore, is to ascertain the sum in dollars "to which the certificate holders are entitled for principal, out-"standing interest and the premium of 2½ per cent. To that "total must be added the sums found due under subparagraphs "(*b*) and (*c*) of paragraph 2 of the proof. Then there must be "ascertained the amount of sterling which would have been "required at the date of the liquidation to purchase the aggregate "amount of dollars so ascertained. This total will represent the "maximum amount which the trustee on behalf of the certificate "holders can receive in respect of the sum proved for. How "much the trustee will in fact receive will depend on the dividend "payable in respect of the sum proved for."

By the order under appeal the judge directed three inquiries as to the amount of the trustee's expenses, the first and second being concerned with expenses incurred down to March 4, 1954 (i.e., the date of the commencement of the winding up), the first not to be proceeded with in the event of the trustee electing to

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[25] [1923] 2 Ch. 466.

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base its proof on the claims for damages. These inquiries appear to differ from each other only in the respect that the first directs conversion into sterling as on the respective dates on which the expenses were incurred, while the record directs conversion into sterling as on March 4, 1954, a maximum of £11,177 6s. 9d., the amount claimed in the proof being set in both cases. The third inquiry relates to the amount of the trustee's future or contingent claim for expenses subsequent to March 4, 1954, and directs conversion into sterling as on that date.

We do not think we need refer in any greater detail as to the terms of these inquiries; but it should be mentioned that the notice of appeal takes the point that in the event of the trustee electing to prove on the basis of damages for conversion or breach of covenant, it was not entitled to claim or receive anything in respect of expenses after December 1, 1953, and that inquiry No. 2 should accordingly be omitted.

In view of Mr. Megaw's argument, the material part of the rest of the order should, we think, be referred to at length. It proceeds as follows: the material part is in these terms:

"And this court doth declare that the provable sum ought to "be computed in manner following:—

"(1) There shall first be computed either:—

"(A) The sterling equivalent of the following amounts "of dollars of the United States of America at the respective "rates of exchange current on the following dates that is to say "206,000 on the 14th day of February, 1931, 205,000 on each "14th day of February and 14th day of August from and "including the 14th day of August, 1931, down to and including "the 14th day of February, 1936, 82,500 on each 14th day of "February and 14th day of August from and including the 14th "day of February, 1935, down to and including the 14th day of "February, 1954, and 8,136.99 on the 4th day of March, 1954, "together with either the amount agreed or found on the making "of the inquiry first hereinbefore directed or the sum of "£11,177 6s. 9d., whichever is the less and together with the "amount agreed or found on the making of the inquiry thirdly "hereinbefore directed; or if the applicant shall so elect

"(B) The sterling equivalent at the rate of exchange current "on the 1st day of December, 1953, of 2,000,000 dollars of the "United States of America being the maximum amount recover- "able by way of damages for conversion of the property com- "prised in the said lease and being also the amount recoverable "by way of damages for breach of the covenant against assign-"ment in the said lease contained

"(2) From the amount so computed under (A) or (B) as the "applicant shall have elected there shall be deducted the amount "if any by which the same exceeds the aggregate of the following "three amounts namely (a) the amount of sterling which would "have been required on the 4th day of March, 1954, to purchase "734,971.89 dollars of the United States of America (b) the "amount agreed or found on the making of the inquiry secondly "hereinbefore directed or the sum of £11,177 6s. 9d., whichever "is the less and (c) the amount agreed or found on the making of "the inquiry thirdly hereinbefore directed; and the amount so "computed after such deduction (if any) as aforesaid shall be the "provable sum but so that any interim distribution in respect of "the first of the said three amounts shall not be delayed by "reason only that the second and third of the said three amounts "or either of them shall remain to be agreed or found as afore-"said." That, I think, is the material part of the order.

It will be seen that by paragraph (1) (A) the judge has directed the computation of the total amount in sterling represented (a) by the 11 unpaid capital instalments (viz., $2,256,000); (b) by interest at the contractual rate from the date of default down to the date of the commencement of the winding up on the $2,200,000 certificates outstanding at the date of default; (c) by the amount agreed or found for the trustee's expenses prior to that date on making the first inquiry, or the amount (i.e., £11,177 6s. 9d.) proved for under this head, whichever was the less; and (d) by the amount agreed or found for the trustee's prospective remuneration on making the third inquiry; the sterling equivalent of the sums representing instalments of principal and interest to be ascertained by converting them into sterling as on the dates when they respectively fell due, and the sterling equivalent of the sums representing the trustee's expenses to be calculated in accordance with the terms of inquiries Nos. 1 and 3 respectively.

It will further be seen that the judge has next proceeded by paragraph 1 (B) of the order to direct the alternative computation at the option of the trustee of the sterling equivalent at the rate of exchange current on December 1, 1953 (i.e., the date of the sale to the Cuban State, being the date of the conversion or breach of covenant charged by the trustee) of $2,000,000 described as the maximum amount recoverable as damages for conversion and also the amount recoverable as damages for breach of the covenant against assignment.

Having thus provided for the ascertainment of, (a) the total amount in sterling due from the company to the trustee at the commencement of the winding up, measured simply by reference to the terms of the covenant for payment of rentals, or, alternatively, (b) the amount in sterling of the damages recoverable by the trustee for conversion or breach of covenant fixed in the first instance simply by reference to the value of the rolling stock at the date of the conversion or breach, the judge proceeds in paragraph 2 to limit for the purposes of proof the sum ascertained under (1) (A) or (1) (B), as the case may be, to the aggregate sum required to satisfy in full the claims of the holders of the outstanding certificates for principal, premium and interest (put at $734,971.89) plus the amount of the trustee's expenses (past or prospective) as agreed or found on the making of inquiries Nos. 2 and 3 (with a maximum as regards inquiry No. 2 of £11,177 6s. 9d., being the amount claimed in the proof), by deducting from the sum ascertained under (A) or (B), as the case may be, the amount (if any) whereby the sum so ascertained exceeds the aforesaid aggregate sum.

For the purpose of ascertaining the amount of this deduction, the $734,971.89 representing the principal, interest and premium due on the 331 outstanding certificates is directed by the order to be converted into sterling as on March 4, 1954, and not on the respective dates on which the payments in question respectively fell due.

Similarly, in the relatively small matter of the trustee's expenses, the sum agreed or found on the making of inquiry No. 2 (which postulates conversion into sterling as on March 4, 1954) is adopted in either alternative as opposed to the amount agreed or found on the making of inquiry No. 1, which postulates conversion into sterling as on the respective dates on which the expenses in question were incurred.

The principles adopted by the judge in quantifying the provable sum thus appear to have been these:

(i) The creditor of the company in this matter is the trustee, as distinct from the holders of the outstanding certificates, who are cestuis que trust, not entitled to claim against the company as creditors, but entitled, as between themselves and the trustee, to have their claim for principal, premium and interest satisfied out of any moneys recovered by the trustee from the company in its capacity as trustee for the certificate holders.

(ii) The first step must, therefore, be to calculate the amount due to the trustee according to the terms of the lease, or as the case may be, by way of damages for conversion or breach of covenant as if the trustee was beneficially entitled to the amount so due. For the purposes of this calculation the amounts found due to the trustee under the lease must be converted into sterling at the rate of exchange obtaining on the respective dates on which they fell due, and on the alternative basis of proof, the damages found due to the trustee must be converted into sterling at the rate of exchange obtaining at the date of the conversion or breach of covenant.

(iii) The trustee cannot, however, prove for the full amount so calculated, but, being a trustee, must limit its proof to the amount required to meet in full the claims of its cestuis que trust, or, in other words, the holders of the outstanding certificates and the trustee's own claim for expenses. It is thus necessary to calculate what is due to the holders of the outstanding certificates for principal, premium and interest, or, in other words, what they would be entitled to receive out of the fund calculated as in (ii) above, if that fund was actually in the hands of the trustee and available for distribution at the date of the commencement of the winding up. For the purposes of this calculation the amount in dollars found due to the holders of the outstanding certificates must be converted into sterling as on the date of the winding up, and this also applies to the trustee's own claim against the fund for its expenses.

(iv) The trustee is thus entitled to prove for the sterling equivalent of the amount in dollars representing the principal, premium and interest due on the outstanding certificates and its own expenses at the rate of exchange obtaining at the date of the commencement of the winding up.

The contest between the parties on this aspect of the case is mainly concerned with the rate of exchange to be adopted for the purpose of converting from dollars into sterling the amounts payable to the certificate holders out of the rentals for which the trustee is entitled to prove.

Mr. Megaw accepts the figure $734,971.89 given in Wynn-Parry J.'s order, which is in fact the amount claimed in paragraph 2 (*a*) of the proof, adjusted as above mentioned, as a correct calculation of the sum in dollars for the sterling equivalent of which the trustee is entitled to prove in respect of the principal, premium and interest due on the 331 outstanding certificates.

But he says that the sum in dollars should be converted into sterling at the rates of exchange prevailing on the respective dates on which the instalments comprised in it fell due, and not, as claimed in the proof and held by Wynn-Parry J., at the rate of exchange prevailing at the date of the commencement of the winding up. The difference here is substantial, as the sterling equivalent on Mr. Megaw's view is £180,724 5s. 1d. as compared with the £264,076 0s. 1d. claimed in the proof.

So far as this court is concerned, it cannot be disputed that as between the company and the trustee the proper rate of exchange for the purpose of ascertaining the sterling equivalent of the instalments due under the lease is the rate of exchange prevailing at the date when each instalment fell due. (See *In re Russian Commercial and Industrial Bank*[26] and the authorities there cited.) We should, however, note that Mr. Wilberforce told us that he wished to keep the point open in case the matter went higher.

Mr. Megaw says the same rule applies to the sums in respect of principal, premium and interest due to the holders of outstanding certificates by reference to which the trustee's claim in respect of the instalments due under the lease must be limited for the purposes of his proof. As we understood him, he contended that the company's only liability to the trustee, so far as the proof was based on the lease, was for rentals and nothing else. The trustee rightly quantified its proof for rentals by reference to the amounts due for principal, premium and interest under the outstanding certificates, but the amounts proved for did not lose their essential character as rentals because they had been so quantified, and, accordingly, should be treated as rentals and converted into sterling as on the respective dates when the instalments of which they were composed fell due.

We do not think this argument accords with the true legal position. The trustee is a creditor of the company for the total amount of the unpaid instalments under the lease, which, through the medium of the trust for the certificate holders, constitute the security for the due payment of the principal, premium and interest to which such holders are entitled under the trust agreement.

The amount due from the company to the trustee under the lease (save as regards interest) does not depend on the number of certificates for the time being outstanding, though the trustee cannot claim to retain out of the amount due to him anything more than the total sum required for payment in full of the principal, premium and interest due on the outstanding certificates together with the trustee's own expenses.

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[26] [1955] Ch. 148; [1955] 2 W.L.R. 62; [1955] 1 All E.R. 75.

It is accordingly right to limit the trustee's proof to that total amount. But on the assumption that the company is solvent, which we understand to be the case, one must, for the purpose of working out the rights of the parties, treat the company as having in the first instance paid over to the trustee the full amount due to the trustee under the lease.

The trustee must then be regarded as bound to apply the fund so provided in paying in full the total amount due for principal, premium and interest on the certificates, together with the trustee's expenses, and to repay the surplus to the company. Once the total amount due on the outstanding certificates and for the trustee's expenses has been ascertained in this way, the trustee's proof may properly be presented as a proof for the rentals due under the lease up to that total amount, but the fact must not be lost sight of that, so far as the holders of the outstanding certificates are concerned, their claim is not for rentals due to them from the company but for payment by the trustee out of the trust fund notionally constituted by the rentals due from the company to the trustee of the full amount of their principal money, premium and interest. The fact that the rentals due from the company to the trustee are to be converted into sterling at the rates prevailing on the dates on which they are respectively due, as opposed to the rate prevailing on the date of the commencement of the winding up, March 4, 1954, reduces the amount in sterling notionally receivable by the trustee from the company. But it does not follow that this reduction must lead to a corresponding scaling down of the amounts payable to the holders of the outstanding certificates. Their right is to be paid in full out of the fund recovered by the trustee on their behalf so far as the money will go. Thus the rate of exchange appropriate to the quantification of the certificate holders' claims is not determined by the rate appropriate to the quantification of the sums due to the trustee under the lease, but must depend on the nature of those claims.

As to that, it is to be once more observed that the certificate holders are not creditors either of the company or of the trustee. Their only right is a right to call upon the trustee to execute its trust to the extent of any moneys from time to time received by the trustee for that purpose. Their right to receive from the

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trustee the amounts of their claims in dollars cannot, therefore, be said to have arisen on any earlier date than the date of the commencement of the winding up. Nor is it possible to relate the claim under any particular certificate to any particular instalment date under the lease.

As we understand it, the principle underlying the rule that conversion into sterling of an unpaid debt in foreign currency should be effected on the date when the debt became due is that a contract to pay a sum in foreign currency is equivalent to a contract to deliver a chattel, and that failure to deliver it on the due date constitutes a breach of contract for which damages must be assessed at the time of the breach. Thus the amount in sterling of the damages suffered through the debtor's failure to pay or deliver the foreign currency on the due date, assessed at the date of the breach, is the price in sterling as at the date of the breach of the sum in foreign currency which the debtor had promised to pay.

This principle has no application in the present case so far as the claim of the certificate holders is concerned, since they claim as cestuis que trust and not as creditors.

Mr. Megaw raised a further argument based on Roxburgh J.'s affirmation of the rejection of the trustee's proof under paragraph 2 (*d*). It will be remembered that this order was to the effect that the court being satisfied that the holders in due course of the 1,867 (or 1,869, adjusted) certificates had renounced any claim to participate in the assets available for distribution, and that such renunciation alone was a sufficient ground for the rejection of that part of the proof of debt, namely, the claim in respect of the sum of £1,480,570 5s. 7d. (the figure appropriate to 1,867 certificates) claimed in paragraph 2 (*d*) of the proof, which was based on or measured by reference to the said 1,867 (or 1,869) certificates, did not think fit to reverse or vary the liquidator's rejection of that part of the proof.

Mr. Megaw complained that Wynn-Parry J.'s order was inconsistent with that of Roxburgh J. He said that the upshot of Roxburgh J.'s order was that the trustee, having proved in respect of $2,200,000 certificates under paragraph 2 (*d*), and having had its proof of debt rejected as regards $1,869,000 of them, was now being allowed to formulate its claim in respect of the remaining $331,000 certificates by reference to the amount for which the trustee would have been entitled to prove in respect of rentals if the 1,869 certificates had in fact been outstanding as well as the

331, in which case the total number of certificates outstanding would have been 2,200.

He says that, having regard to Roxburgh J.'s order, the proper course would have been not merely to disregard the 1,869 certificates, while treating the proportion of the instalments appropriate to the satisfaction of the claims in respect of them, if such claims had been allowed as available to meet the claims of the holders of the 331 certificates, but to treat that proportion of the instalments as irrecoverable. On this basis, he says, the proper course would have been to take 331 2,200th parts only of the total amount of the instalments as the sum available to meet the claims under the 331 outstanding certificates, eliminating the remaining 1,869 2,200th parts as attributable exclusively to the 1,869 certificates the trustee's proof in respect of which has been rejected. He pointed out that the sums proved for in respect of principal and premium due to the holders of the 331 and the 1,869 certificates respectively under paragraph 2 (*a*) and (*d*) amounted together to $2,255,000, or only $1,000 less than the total amount of the eleven unpaid capital instalments, the differences being accounted for in the way already explained. Consequently, he said, the sums in dollars for which the trustee could prove in respect of the 331 certificates must, like the instalments under the lease, be converted into sterling at the rates of exchange prevailing on the dates when the instalments comprised in them respectively fell due; for if they were converted at the rate of exchange prevailing at the date of the commencement of the winding up, they could only be satisfied by trenching upon the proportion of the instalments attributable to the 1,869 certificates, which would be inconsistent with Roxburgh J.'s order.

We think there is a fallacy here. The rejection of the proof in respect of the 1,869 certificates meant that no claim could be made in respect of them. It did not mean that the rentals applicable in satisfying the claims of the holders of the outstanding 331 certificates were to be reduced by deducting the proportion of them (1,869 2,200ths) attributable to the 1,869 certificates. The capital instalments under the lease continued to be payable irrespective of the number of certificates which might for the time being be outstanding. The redemption or buying-in of certificates, or, we might add, the renunciation of all claims under any given certificates, merely had the effect of improving the security of the certificates left outstanding. The whole fund constituted by the rentals due remained available to satisfy the claims of the 331 certificates in fact outstanding up to the amount required to pay principal, premium and interest in full.

Mr. Megaw's submission comes near to treating the 1,869 certificates as having been kept on foot for the benefit of the company, which surely cannot be right. Accordingly, we reject this argument. Mr. Megaw did not develop his argument on this part of the case with reference to the alternative claims for damages, but we understand his submission there to be that by parity of reasoning the trustee's claim should be limited to 331 2,200ths of any damages allowed.

In deciding that the amounts due to the holders of the outstanding certificates should be converted into sterling at the rate of exchange prevailing at the date of the commencement of the winding up, Wynn-Parry J. accepted Mr. Wilberforce's submission that the principle underlying *In re Chesterman's Trusts* [27] applied. That submission was repeated before us and we agree with the judge's acceptance of it.

For the reasons we have stated, we are of opinion that the judge came to a right conclusion on all the material questions in this case and accordingly that this appeal fails and should be dismissed.

Willmer L.J. I wish to make it clear that I concur in, and share the responsibility for, the judgment which has just been delivered, except with regard to two points upon which I have the misfortune to differ from my brethren. I need hardly say that only with some hesitation and diffidence do I venture to express a conflicting view, especially as my view is also in conflict with that of the trial judge.

The first point upon which I differ from my brethren and from the trial judge is with regard to the proper law of the contract. I can find no satisfactory reason for applying Pennsylvanian law. For reasons which I will attempt to state as briefly as possible, I have arrived at the conclusion that the proper law of the contract was that of the Republic of Cuba.

Since we have held that even applying Cuban law the appellants must fail on their plea of statutory novation, as also in their reliance upon the Cuban moratorium laws, it is obvious that the issue as to the proper law of the contract has become one of only academic interest. But as the matter has been very fully argued, and in case it should hereafter be thought to be of any relevance, I think it only right to state my conclusion and the reasons which have impelled me to it.

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[27] [1923] 2 Ch. 466.

The principles to be applied in determining what is the proper law of the contract have already been stated by my Lord in the judgment which has just been delivered. I do not disagree, nor do I think there is any room for disagreement, as to the principles to be applied.

They are succinctly summed up in the words of Viscount Simonds, in the passage already quoted, to the effect that the proper law is the one "with which the transaction has its closest "and most real connection." It is by my attempt to apply those principles to the particular facts of this case that I, for my part, have been led to the conclusion that the proper law of this contract, i.e., of the lease agreement, was Cuban.

[His Lordship then referred in detail to the wording of the documents which led him to this conclusion and continued:] For these reasons, although I do not think it is of any materiality in view of our decision on other aspects of the case, I am disposed to accept the contention put forward on behalf of the appellants that, so far as the lease is concerned, Cuban law was the proper law of the contract. It remains for me to add that I am fully in agreement with my Lords that the principle of renvoi finds no place in the field of contract. I share with them the view that, if Cuban law were to be regarded as the proper law of the contract, such law would be the domestic law of Cuba, and not Cuban private international law.

The other point upon which I have the misfortune to disagree is with regard to the quantum in respect of which the trustee is entitled to prove. This seems to me to raise questions of very grave difficulty, and in order to appreciate the questions involved it is necessary to refer briefly to the history of what occurred.

By clause First I of the lease agreement the company was liable to pay interest half-yearly at the rate of 3¾ per cent. on all outstanding certificates up to and including February 14, 1936. By clause First II the company was liable to pay half-yearly instalments in respect of capital at the rate of $206,000 up to and including February 14, 1931, and thereafter at the rate of $205,000 up to and including February 14, 1936. Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000, leaving $2,200,000 then outstanding. It defaulted in paying the instalments of $206,000 due on February 14, 1931, and all subsequent instalments. It thus defaulted in respect of the last eleven instalments of capital, to a total amount of $2,256,000. It continued to pay interest up to and including August 14, 1934, but thereafter it defaulted in respect of all interest payments due. By February 14, 1936, the total of the default in respect of capital instalments and interest had reached $2,503,500. No interest has been paid since February 14, 1936, and the trustee has included a claim for interest at the rate of 6 per cent. per annum from that date to the date of the liquidation, that is to say, March 4, 1954. It has not been suggested to us that 6 per cent. per annum was other than a proper rate of interest to charge in respect of this period. The effect of this interest was to increase the total indebtedness outstanding at the date of the liquidation to $4,886,009.59.

In 1937 certain proceedings were instituted by the trustee against the company in the Superior Court of the State of Maine in the United States of America. It is unnecessary to refer to the details of those proceedings: it is sufficient to record that they were ultimately compromised on the terms, inter alia, of an offer by the company to purchase outstanding certificates at a price of $147.50 per certificate. This led to the company purchasing a number of the outstanding certificates, and by the time of the liquidation a total of 1,869 certificates had been purchased by the company, leaving only 331 certificates outstanding in the hands of the public. The 1,869 certificates purchased by the company were never presented for retirement, but remained in the hands of the company until the date of the sale to the Cuban State. These certificates, in accordance with paragraph (D) of annex A (I) to the preliminary agreement of September 5, 1953, were transferred to the Cuban State together with all the rest of the company's assets in Cuba. They were then, in turn, transferred by the Cuban State to the new company, Occidentales.

The claim of the trustee is set out under four headings in paragraph 2 of the proof of debt filed on his behalf. Under sub-paragraph (*a*) a claim is made in respect of 333 certificates, said to be then outstanding in the hands of the public. It is common ground that the number of certificates then outstanding was in fact 331, and that the figures of the claim must be adjusted accordingly. The amount claimed under this sub-paragraph is a sum made up of (i) the face value of the certificates, (ii) premium of 2½ per cent. on such face value, (iii) interest at 7½ per cent. per annum on such face value from August 15, 1934, to February 14, 1936, and (iv) interest at 6 per cent. per annum on such face value from February 15, 1936, to March 4, 1954. The total as originally claimed under this heading was $739,412.81, but after adjusting this figure for 331 certificates instead of 333 the total should be $734,971.89.

Under subparagraph (*d*) a precisely similar claim, made up of face value, premium and interest, is put forward in respect of the certificates purchased by the company—said to be 1,867, but in fact, 1,869, certificates. The total under this heading, as originally claimed, was $4,145,596.78, but the adjusted figure should be $4,150,037.69.

Subparagraph (*b*) contains a claim for expenses incurred by the trustee in the performance of the trust up to the date of the liquidation, and in subparagraph (*c*) there is a claim for estimated expenses incurred or to be incurred subsequent to the date of the liquidation. So far as this appeal is concerned, nothing turns on the claims put forward in subparagraphs (*b*) and (*c*).

Subject to one small discrepancy, the total of the amounts claimed under subparagraphs (*a*) and (*d*) is the same as the total of the company's outstanding indebtedness at the date of the liquidation as set out above; and the sum of the first two items in these two subparagraphs is equivalent to the total of eleven instalments outstanding under clause First II of the lease agreement. In each case there is a discrepancy of $1,000, which is attributable to the fact that the unpaid instalment, due on February 14, 1931, was one of $206,000, whereas the sums set out in subparagraphs (*a*) and (*d*) correspond in amount with instalments at the rate of $205,000 throughout.

The sums in dollars claimed in the various subparagraphs of paragraph 2 of the proof of debt are converted into sterling at a uniform rate of $2.80 to the pound, and it is this circumstance which has given rise to dispute between the parties.

But, to continue with the history of the matter, in December, 1956, the liquidators applied to the court for leave to make an interim distribution. For the purpose of enabling the court to arrive at any decision about this it was necessary to consider what the amount of the company's liability in respect of the outstanding certificates was likely to be.

If the trustee was to be entitled to claim in respect of all the 2,200 certificates outstanding, it was clear that insufficient funds would be available in the hands of the liquidators to justify any interim distribution. But if the trustee's claim could be confined to the 331 certificates remaining outstanding in the hands of the public, it was considered that some interim distribution would be

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justifiable. The application to the court was supported by an affidavit sworn by the liquidators, which proved the purchase of 1,869 certificates by the company, and the fact that those certificates were handed to the Cuban Government on completion of the sale of the company's undertaking, and were subsequently delivered by the Cuban Government to the new company, Ferrocarriles Occidentales. It was also provided: (a) that these 1,869 certificates were deposited with the National Bank of Cuba with an instruction from Ferrocarriles Occidentales that they were not to be withdrawn without the authority in writing of the Minister of Finance of Cuba; (b) that such certificates had been stamped "Not transferable"; and (c) that the Cuban Government had stated that no claim had been or would be made by the Cuban State against the company or against the trustee in respect of these certificates.

The application came before Roxburgh J., who made an order dated December 4, 1956, which has been placed before us. The order recites that the court was satisfied that the holders in due course of the certificates (wrongly stated to number 1,867) had renounced any claim to participate in the assets available for distribution in the winding up and that such renunciation alone was a sufficient ground for the rejection of that part of the trustee's proof of debt—namely, the claim contained in paragraph 2 (*d*) thereof—which was based on or measured by reference to the 1,867 certificates. The court accordingly did not think fit to reverse or vary the decision of the liquidators rejecting the proof of debt in so far as it related to the claim contained in paragraph 2 (*d*).

Having regard to this decision the trustee has not in fact sought to proceed further with any claim in respect of the 1,869 certificates purchased by the company, which formed the subject-matter of paragraph 2 (*d*), and in these proceedings he has limited himself to the claims set out in subparagraphs (*a*), (*b*) and (*c*). So far as the claims under subparagraphs (*a*) and (*c*) are concerned, Wynn-Parry J. directed certain inquiries as to the expenses there claimed. No argument has been addressed to us with regard to this part of the judge's order, nor has any question been raised before us with regard to the rate of exchange applicable to any claim for expenses under these two subparagraphs. The problem which has arisen has been with regard to the method of computation to be adopted in order to quantify in sterling the claims of the trustee under subparagraph (*a*).

Wynn-Parry J. directed that the amount for which the trustee is entitled to prove should be ascertained as follows: In the first place it must be ascertained what in dollars was due to the trustee in respect of interest under clause First I (a) of the lease, and in respect of capital instalments due under clause First II. This would represent the liability of the company at the date of the termination of the lease, that is February 14, 1936. The claim for further interest subsequent to that date he treated as in effect a claim for rent on the basis of holding over. The judge directed that, for the purpose of converting the total of the sums so ascertained into sterling, each payment due, whether of interest or of capital instalment, should be converted at the rate of exchange prevailing upon the date when it was due. He held that any sums due for expenses under paragraph 2 (*b*) should be converted into sterling at the rates prevailing on the respective dates of payment; and any amount found due for expenses under paragraph 2 (*c*) should be converted at the rate prevailing at the commencement of the winding up. The resulting sum in sterling would, in the judge's view, represent the amount for which the trustee would be entitled to prove in the liquidation. Pausing there, it will be seen that this sum would represent the sterling equivalent of the whole of the sums in dollars claimed under subparagraphs (*a*), (*b*), (*c*) and (*d*), that is, a total of nearly five million dollars.

The judge, however, then went on to point out that, being a trustee, the trustee would only be entitled to receive in respect of its proof such a sum in sterling as would be sufficient to satisfy the proper claims of the certificate holders, which means in this context the claims of the holders of the 331 certificates, with the addition of such a sum as might be found due for expenses under subparagraphs (*b*) and (*c*) of paragraph 2 of the proof. As to the claims of the certificate holders he held that the principle of *In re Chesterman's Trusts*[28] applied. Applying this principle he directed that the sum in dollars must be ascertained to which the 331 certificate holders are entitled, under the terms of the trust agreement, in respect of principal, outstanding interest and premium of 2½ per cent. This sum, when ascertained, he held should be converted into sterling at the rate prevailing at the date of the liquidation, and the resulting amount in sterling would represent the maximum that the trustee, on behalf of the certificate holders, would be entitled actually to receive in respect of the sum proved for.

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[28] [1923] 2 Ch. 466.

This method of computation involves that, although for the purpose of ascertaining in sterling the total of the capital instalments and interest in default the conversion was to be at the rates of exchange prevailing on the dates when the various payments ought to have been made (in most cases approximately 5 dollars to the £), the holders of the 331 certificates would be entitled to claim, out of the total so ascertained, a sum in sterling sufficient to purchase the dollars attributable to their share at the rate of exchange prevailing at the date of the liquidation (that is, substantially 2.80 dollars to the £).

This, Mr. Megaw argued, could not possibly be justified, for it would result in the 331 certificate holders being able to claim for too large a slice of the available cake. His argument may be summarised as follows. The method of computation adopted by the judge is inconsistent with the order made by Roxburgh J., the effect of which was to uphold once and for all the liquidator's rejection of the proof in so far as it was based upon or measured by reference to the 1,869 certificates purchased by the company. It follows that the trustee is only entitled to claim for such proportion of the company's total indebtedness as is attributable to the 331 certificates remaining in the hands of the public. It is therefore wrong to allow the trustee to prove for the whole of what is due in respect of all 2,200 outstanding certificates, and to retain out of the proceeds enough sterling to pay off the 331 certificate holders in dollars purchased at the rate of 2.80 dollars to the £. On the contrary, the total indebtedness of the company in dollars having quite properly been converted into sterling at the rates of exchange appropriate on the dates when the various payments were due, the trustee is only entitled to claim, on behalf of the 331 certificate holders, such proportionate part of the sum in sterling so ascertained as is attributable to the 331 certificates—that is, 331/2,200ths of the sterling sum.

In order to illustrate his argument Mr. Megaw prepared and placed before us a revised calculation showing in detail what the result would be—that is, what the sterling liability of the company attributable to the 331 certificate holders would be if his argument were accepted. This calculation results in a figure of £180,724 5s. 1d. in respect of paragraph 2 (*a*) of the proof, instead of the sum of £264,076 0s. 1d. as therein claimed. Mr. Wilberforce, on the other hand, strenuously defended the order made by the judge, and contended that the method adopted by him was the correct method of computation in the circumstances of this case. But, in spite of Mr. Wilberforce's attractive argument to the contrary, I am unable to see any logical answer to Mr. Megaw's contention.

The argument may be tested by considering what would be the position if the whole of the 2,200 outstanding certificates were in the hands of the public. In such circumstances the trustee would be entitled to prove for the whole of the sums in dollars set out in subparagraphs (*a*) and (*d*) of paragraph 2 of the proof, converted into sterling at the rates of exchange prevailing on the dates when the amounts, whether of capital instalments or of interest, were due. As trustee, it would then have to account to all the certificate holders in equal shares, so that each certificate holder would be entitled to 1/2,200th part of the sterling sum so ascertained. Here the trustee is claiming on behalf of 331 certificate holders, and I do not see how he is entitled to claim on their behalf more than 331/2,200th parts of the sterling sum. If the 331 certificate holders were entitled to have their dollar claims converted into sterling at the current rate of exchange, they would be put in a privileged position as compared with the notional holders of the remaining 1,869 certificates.

Putting the matter in another way, if the trustee were able to put its hands on the whole of the sum representing the sterling indebtedness of the company, it would, as I see it, have to account to the company (or to the Cuban State) for the proportion attributable to the 1,869 shares, in the same way and to the same extent as to the 331 certificate holders for the proportion attributable to their share. The notional cake is only a certain size, and each certificate holder is entitled to 1/2,200th part of it. Paragraph 2 (*a*) of the proof represents the trustee's claim in respect of its liability to the 331 certificate holders: paragraph 2 (*d*) represented its claim in respect of what would have been its liability in respect of the remaining 1,869 certificates if they had not been purchased by the company. The two added together represent the total indebtedness of the company in respect of capital instalments and interest due but unpaid. The sterling equivalent of that indebtedness must be calculated having regard to the rates of exchange prevailing on the dates when the respective payments ought to have been made. Having regard to the order made by Roxburgh J. no claim can now be made in respect of so much of the total as is attributable to the 1,869 certificates. The trustee's claim under paragraph 2 (*a*) must, therefore, in my judgment, be limited to 331/2,200th parts of the total as so ascertained.

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I would, therefore, allow the appeal to the extent of reducing the trustee's claim under paragraph 2 (*a*) of the proof to a sum calculated in accordance with Mr. Megaw's submission, and I would have been disposed to direct an inquiry as to the actual figures, if these could not be agreed. Since, however, my brethren take a different view, the order to be made must be as directed by them.

Appeal dismissed.
Leave to appeal.

Solicitors: *Norton, Rose & Co.; Herbert Smith & Co.*

J. A. G.

1959
June 23.

Danckwerts J.

In re TURNER'S WILL TRUSTS.
BRIDGMAN *v.* TURNER.

[1959 T. No. 587.]

Trusts and Trustee — Variation of trusts — Act of 1958 — *Protective trusts—Application for variation—" Any person in respect of any " discretionary interest of his " — Whether unborn and unascertained persons included—Whether arrangement must be for the benefit of unborn and unascertained persons—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By his will a testator, who died on October 2, 1926, devised and bequeathed his residuary estate to his trustees on trust for sale to divide the residue after payment of funeral and testamentary expenses, debts and legacies into two equal parts, one of such parts to be divided equally between his children by his former wife (other than two children for whom he had already provided) and the other part to be divided equally between his children by his present wife. The share of each child was to be held by the trustees on protective trusts for each child during his or her life and after his or her death upon trust for such of the children or remoter issue of such child as such child should appoint and in default of and subject to any such appointment upon trust for the children of such child in equal shares. The will also contained a power for any such child of the testator to appoint a life or lesser interest in any part not exceeding one-half of such child's share to any wife or husband him or her surviving.

[Reported by MISS V. A. MOXON, Barrister-at-Law.]

A daughter of the testator who became entitled to a life interest in a one-eighth share in his residuary estate, applied to the court under section 1 of the Variation of Trusts Act, 1958,[1] together with the other persons interested in the share, for an order approving on behalf of all persons (including unborn persons) who might become interested in the trust fund an arrangement whereby the trusts of the will should be varied by enlarging the daughter's protected life interest into an absolute life interest on condition that she released the powers of appointment conferred on her by the will, that she and her two children (both of whom were of age and unmarried) divided the trust fund between them in accordance with the actuarial value of their respective interests therein and that the children settled the parts of the trust fund taken by them on themselves and their respective issue:—

Held, (1) that the words "any person" in section 1 (1) (*d*) of the Variation of Trusts Act, 1958, included an unascertained or an unborn person; so that the court was under no obligation to require some benefit to be provided for unborn or unascertained persons (such as an unascertained future husband) who had a discretionary interest under a protective trust.

(2) That the proposed arrangement was for the benefit of the unborn issue of the daughter's children. The court, accordingly, would approve the arrangement.

ADJOURNED SUMMONS.

By his will, dated November 20, 1918, the testator, George Lewis Turner, devised and bequeathed his residuary estate to his trustees upon trust for sale to pay his funeral and testamentary

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[1] Variation of Trusts Act, 1958, s. 1: "1.—(1) Where property, "whether real or personal, is held "on trusts arising, whether before "or after the passing of this Act, "under any will, settlement or other "disposition, the court may if it "thinks fit by order approve on be"half of—(*a*) any person having, "directly or indirectly, an interest, "whether vested or contingent, under "the trusts who by reason of infancy "or other incapacity is incapable of "assenting, or (*b*) any person "(whether ascertained or not) who "may become entitled, directly or in"directly, to an interest under the "trusts as being at a future date or on "the happening of a future event a "person of any specified description "or a member of any specified class "of persons, so however that this "paragraph shall not include any "person who would be of that des"cription, or a member of that class, "as the case may be, if the said date "had fallen or the said event had "happened at the date of the appli"cation to the court, or (*c*) any "person unborn, or (*d*) any person "in respect of any discretionary in"terest of his under protective trusts "where the interest of the principal "beneficiary has not failed or deter"mined, any arrangement (by whom"soever proposed, and whether or "not there is any other person bene"ficially interested who is capable of "assenting thereto) varying or re"voking all or any of the trusts . . . "Provided that except by virtue of "paragraph (*d*) of this subsection the "court shall not approve an arrange"ment on behalf of any person "unless the carrying out thereof "would be for the benefit of that "person."

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expenses and debts and the legacies bequeathed by the will or any codicils thereto and to stand possessed of the residue upon trust to divide the same into two equal parts, one of such parts to be divided equally between his children by his former wife who should survive him or die in his lifetime leaving issue surviving him (other than two children for whom he had already provided) and the other part to be divided similarly between the children of his present wife. Clause 16 of the will provided that the trustees should invest the share of each child in any of the investments thereinafter authorised and should if at the time of the trust taking effect no act or event (other than the exercise of any power of appointment thereinafter given or a consent to any exercise of the power of advancement thereinafter contained) should have happened whereby the life interest given to such child would if belonging to such child absolutely have become vested in or charged in favour of some other person pay the income of the said share to such child during his or her life or until some such act or event as aforesaid should happen. Clause 17 provided that in the event of the failure or determination in the lifetime of such child of the testator of his or her life interest the trustees should during the remainder of the life of such child as they should in their absolute discretion think fit pay all or any part of the income to or apply the same for the maintenance and personal support or benefit of all or any one or more of the following, namely, such child and the wife or husband (if any) of such child and the children or remoter issue of such child for the time being in existence and any other persons for the time being entitled or interested to or in such child's share under the trusts therein contained to take effect after the death of such child in such proportions and manner as the trustees should in their absolute discretion think proper and subject to the aforementioned discretionary power the trustees should during the remainder of the life of such child hold the income or so much thereof as should not be applied under the said discretionary power upon the trusts for which the said income would be held if such child were dead. Clause 18 provided that after the death of such child the trustees should stand possessed of such child's share upon trust for such of the children or remoter issue of such child and in such manner as such child of his should by deed or deeds with or without power of revocation or by will or codicil appoint and in default of and subject to any such appointment upon trust for all or any the children or child of such child of the testator who being male should attain the age of 21 years or being female should attain that age or marry if more than one in equal shares. In the event of a failure of the above-mentioned trusts such share was to accrue to the shares of the other children of the testator if more than one in equal shares. Clause 20 gave to every child of the testator power by will or codicil to appoint to any wife or husband of such child an interest for life or any less interest in any part of such child's share not exceeding one-half.

On October 15, 1924, the testator made a codicil making a change in the appointment of executors and otherwise confirming the will.

The testator died on October 2, 1926, whereupon his daugher, Freda Mabel Bridgman, one of the applicants, became entitled to a protected life interest in a one-eighth share in his residuary estate on the trusts contained in clauses 16, 17 and 18 of the will.

The present trustees of the will were the daughter's husband, John Roddick Bridgman, who was one of the applicants, Alfred Mandeville Turner and Theodore Francis Turner.

On May 8, 1959, the daughter, and the other applicants, her husband and her two children, Nicholas Charles Haydon and Sara Haydon, both of whom were of age and unmarried, issued an originating summons asking that the arrangement set out in the schedule thereto might be approved on behalf of all persons (including unborn persons) who might become interested under the trusts declared by the will concerning the daughter's one-eighth share.

The arrangement set out in the schedule was an arrangement whereby, after payment of the costs of the present application, the interest of the daughter in the income of the trust fund should be enlarged into an interest for her life which should not be liable to fail or determine during her lifetime in the manner set out in clause 16 of the will, upon the terms that (a) the daughter would release the power conferred on her by clause 18 of the will to appoint the capital and income of the share in favour of her children and remoter issue and the power conferred on her by clause 20 to appoint an interest in the income of the trust fund to any husband who might survive her; (b) the daughter and her two children should divide the share between them in specie in accordance with the actuarial value of their respective interests therein; and (c) that the daughter's children should settle the parts of the trust fund to be taken by them respectively on trust for themselves and their respective issue. The trusts of such settlements were revocable by the daughter's children with the consent of the trustees.

John Vinelott for the applicants. The question is whether "any person" in section 1 (1) (*d*) of the Variation of Trusts Act, 1958, includes persons as yet unborn or unascertained so that, by virtue of the proviso to the section, the court is not concerned to see that the arrangement is for the benefit of any future husband of Mrs. Bridgman or of the unborn issue of her two children. The arrangement is for the benefit of the unborn issue of the children. The only question is whether the court can disregard the interest of a future husband of Mrs. Bridgman.

J. A. Wolfe for the respondents, the independent trustees of the will. Where it is necessary to include unborn and unascertained persons, as in paragraphs (*b*) and (*c*), Parliament has done so expressly. The persons referred to in paragraph (*a*) must, of necessity, be ascertained. Paragraph (*b*) refers to persons "whether ascertained or not"; and paragraph (*c*) deals with unborn persons. The argument is that "persons" standing by itself in this section does not include unborn and unascertained persons because of the express reference to such persons in other parts of the same section. This view did not, apparently, appeal to Roxburgh J. in *In re Poole's Settlements Trusts*,[2] although the point does not appear to have been argued. Roxburgh J.[3] appears to have thought that under paragraph (*d*) he was not bound to consider unborn persons, but that he should, in exercising his discretion, take their benefit into account.

John Vinelott in reply. If the words "any person" in paragraph (*d*) and the proviso to section 1 are read as limited to persons in existence and ascertained, the proviso becomes, save in exceptional circumstances, completely useless. The statutory protective trusts in section 33 of the Trustee Act, 1925, necessarily include unascertained persons because the beneficiaries of the discretionary trusts include the future issue and any future husband or wife of the principal beneficiary.

DANCKWERTS J. referred to the provisions of the will and the proposed arrangement and continued: The question has been raised whether I can approve this arrangement, having regard to the fact that there is only a possible benefit for unborn issue which may be defeated under the proposed settlements; and that there is no provision whatever for any future husband of the testator's daughter, who might be a member of the class entitled to a share under the discretionary trust.

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[2] [1959] 1 W.L.R. 651; [1959] 2 All E.R. 340.

[3] [1959] 1 W.L.R. 651, 656.

The first point is whether I am under an obligation to require any provision to be made for such persons at all, having regard to the fact that their interests only arise under the possible discretionary trust which will only come into operation in the event of the daughter's life interest being forfeited under the trusts of her father's will. The relevant provision is in section 1 of the Variation of Trusts Act, 1958. [His Lordship read the section and continued:] In other words, in cases other than those covered by paragraph (*d*), the court must be satisfied that the carrying out of the arrangement would be for the benefit of the person mentioned, but in case (*d*) the court may, if it likes, disregard the question whether any benefit is provided or not.

The point has been raised whether " any person " in (*d*) in regard to the discretionary trusts includes an unborn person. My attention has been directed to the fact that in (*b*) the words " whether ascertained or not " have been inserted; and (*c*) deals with an unborn person in terms. Therefore, it is argued that I have no power to approve under (*d*) in the case of persons unborn, even though such a person is a person who would benefit from a discretionary interest under the protective trusts.

I do not think that argument is well founded. It seems to me that the words " any person " are perfectly general, and, unless restricted in some way, must include an unascertained or an unborn person: in other words, any person who might take under the provisions of the discretionary trust. It is true that there is a certain antithesis between paragraphs (*b*) and (*c*), referring to persons ascertained or not and persons unborn, and (*d*); but it does not seem to be a necessary conclusion from that that persons unborn are excluded from paragraph (*d*). It appears to me to be important that one finds the kind of provision which one would suppose the section had in mind in section 33 of the Trustee Act, 1925, where the persons who are to take under a discretionary trust under protective trusts are defined by the section as " the following persons (that is to say)—(*a*) the " principal beneficiary and his or her wife or husband, if any, " and his or her children or more remote issue, if any; or (*b*) if " there is no wife or husband or issue of the principal beneficiary " in existence, the principal beneficiary and the persons who

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"would, if he were actually dead, be entitled to the trust "property or the income thereof . . ." That plainly includes the possibility of the persons interested being either unborn or unascertained. Having regard to that, it seems to me that the provisions in section 1 (1) (*d*) of the Variation of Trusts Act, 1958, must have been directed to that particular statutory provision under the statutory protective trusts; and that, therefore, I am not under any obligation to require some benefit to be provided for the persons who would otherwise be members of the class coming within paragraph (*d*).

I am here concerned only with the possible case of an unascertained future husband, because it seems to me that the unborn grandchildren of the daughter do take a benefit under the proposed arrangement. Under the provisions of the will relating to the shares as they stand, they could only take an interest in capital if the power of appointment in favour of the issue was exercised in their favour to the exclusion of children of the daughter. That power is going to be released in the present case; and that would cut out their interest. As regards their interest under the discretionary trust, it requires the decision of the trustees to give them anything. They might be given nothing, even supposing the discretionary trust ever came into effect at all. Under the proposed settlements by the two children, they are given, directly, interests which would only be cut out in the event of the settlor being allowed by the trustees to revoke the trusts so that he could retain the capital for himself. Therefore, on balance, it seems to me plain that, so far as the grandchildren are concerned, the arrangement does confer a benefit upon them; and I am prepared to approve the arrangement accordingly.

Order accordingly.

Solicitors: *Freshfields.*

1959
June 12, 25.

Roxburgh J.

BERNSTEIN *v.* BERNSTEIN.

Contempt of Court—Committal order—Ex parte motion, on—Ward of court—Removal from jurisdiction—Order made on ex parte application by Court of Chancery of County Palatine of Lancaster—Ex parte application to extend order to High Court—Jurisdiction of

[Reported by Miss V. A. Moxon, Barrister-at-Law.]

Chancery Division—Court of Chancery of Lancaster Act, 1850 (13 *&* 14 *Vict. c.* 43), *s.* 15—*R.S.C., Ord.* 52, *r.* 3.
Lancaster Chancery Court.

On May 8, 1959, the Court of Chancery of the County Palatine of Lancaster made an order, on an ex parte motion, committing the respondent to gaol for his contempt of court in removing a ward of the County Palatine Court out of the United Kingdom without leave. On an ex parte application under section 15 of the Court of Chancery of Lancaster Act, 1850,[1] for an order making the committal order an order of the High Court:—

Held, (1) that section 15 of the Act of 1850 gave the High Court a discretion to extend an order of the County Palatine Court to cover the jurisdiction of the High Court, and that a committal order made ex parte should not be extended unless the High Court would have had jurisdiction to make such an order in the circumstances prevailing on the day of the hearing before the High Court.

(2) That under R.S.C., Ord. 52, r. 3,[2] a committal order might not be made ex parte in the Chancery Division of the High Court

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[1] Court of Chancery of Lancaster Act, 1850, s. 15: "Whenever a "plaintiff or defendant in any suit "or proceeding in which a decree or "order shall have been made by the "said County Palatine Court shall "reside or withdraw his person or "goods out of the jurisdiction of the "said court, and also whenever any "decree or order of the said court "cannot be fully enforced by reason "of the non-residence of any party "to be bound thereby within the "jurisdiction of the said court, then "and in every such case it shall be "lawful for Her Majesty's High "Court of Chancery, upon the appli- "cation of any person entitled to the "benefit of such decree or order, and "upon the production of a transcript "of such decree or order, or such part "thereof respectively as cannot be "enforced for the reasons aforesaid, "under the signature of the registrar "of the said County Palatine Court, "and an affidavit that by reason of "such non-residence or removal as "aforesaid such decree or order, or "such part thereof as aforesaid, can- "not be enforced, to make such "decree or order, or so much thereof "respectively as cannot be enforced "for any of the reasons aforesaid, a "decree or order of the said High "Court of Chancery, and thereupon "such decree or order, or such part "thereof respectively as aforesaid, "shall and may be enforced against "such of the parties bound by the "same as shall be within the juris- "diction of the said High Court of "Chancery, and all proceedings shall "and may be had thereupon as if "such decree or order had been "originally made by the said High "Court of Chancery, and all the "reasonable costs and charges of "and consequent upon such applica- "tion shall and may be recovered in "like manner as if the same were "part of such decree or order."

[2] R.S.C., Ord. 52, r. 3: "Except "where according to the practice "existing immediately before Novem- "ber 1, 1875, any Order or Rule "might be made absolute ex parte in "the first instance, and except where "notwithstanding Rule 2 a motion or "application may be made for an order "to show cause only, no motion shall "be made without previous notice to "the parties affected thereby. But "the court or a judge, if satisfied "that the delay caused by proceed- "ing in the ordinary way would or "might entail irreparable or serious "mischief, may make any order ex "parte upon such terms as to costs or "otherwise, and subject to such "undertaking, if any, as the court "or judge may think just; and any "party affected by such order may "move to set it aside."

unless the court was satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief; that, as in the circumstances prevailing at the time of the hearing of the present application the court was not so satisfied, there would have been no jurisdiction in the High Court to make a committal order, and that therefore the order of the County Palatine Court should not be extended to cover the jurisdiction of the High Court.

Favard v. *Favard* (1896) 75 L.T. 664 and *O'Donovan* v. *O'Donovan* [1955] 1 W.L.R. 1086; [1955] 3 All E.R. 278n. considered.

MOTION.

On May 8, 1959, the Court of Chancery of the County Palatine of Lancaster, upon an ex parte motion by the applicant, Doris Bernstein, made an order committing the respondent, Harry Bernstein, the applicant's husband, to Strangeways Gaol for his contempt in removing Miriam Bernstein, a ward of the County Palatine Court, out of the United Kingdom and out of the jurisdiction of the County Palatine Court without leave and preventing her from being returned to the custody of the applicant.

The respondent had taken the ward out of the United Kingdom on April 30, 1959, and had not returned. The applicant now applied ex parte under section 15 of the Court of Chancery of Lancaster Act, 1850, for an order making that part of the order of the County Palatine Court which committed the respondent to prison an order of the High Court.

L. A. Cohen for the applicant. The basis of this jurisdiction is section 15 of the Court of Chancery of Lancaster Act, 1850. Orders of the County Palatine Court were extended to the jurisdiction of the Chancery Division of the High Court in *Duke* v. *Clarke* [3] and *Dunmore* v. *Wharam*.[4] The court has jurisdiction to make an order for committal on an ex parte application: see *O'Donovan* v. *O'Donovan*,[5] following *Favard* v. *Favard* [6] and *In re Evans*,[7] which were both concerned with writs of attachment.

[ROXBURGH J. In *Favard* v. *Favard* [8] the court was not bound by the modern rules; but R.S.C., Ord. 52, r. 3, binds me. *O'Donovan* v. *O'Donovan* [9] is inconsistent with the rules unless it is explained by some special rule in the Divorce Division.]

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[3] [1894] W.N. 100.

[4] (1898) 67 L.J.Ch. 221.

[5] [1955] 1 W.L.R. 1086; [1955] 3 All E.R. 278n.

[6] (1896) 75 L.T. 664.

[7] [1893] 1 Ch. 252; 9 T.L.R. 108.

[8] 75 L.T. 664.

[9] [1955] 1 W.L.R. 1086.

Procedure in the Divorce Division is governed by R.S.C., Ord. 68, r. 1. As regards R.S.C., Ord. 52, r. 3, it cannot be alleged that any irreparable harm would ensue if no order were made; but there is reason to believe that the respondent may come back into this country in the near future and, if he does, the order of the County Palatine Court will not be effective against him unless he goes within the jurisdiction of that court. [Reference was also made to *D.* v. *A. & Co.*[10]]

June 25. ROXBURGH J. read the following judgment. This is a motion to make an order dated May 8, 1959, and made in the Court of Chancery of the County Palatine of Lancaster, an order of this court.

[His Lordship read section 15 of the Court of Chancery of Lancaster Act, 1850, and continued:] The phrase "it shall be "lawful" indicates that I have a discretion in the matter. It was long ago laid down that such an application should be made ex parte, and this motion is so made, though whether that is consistent with the present Rules of the Supreme Court I do not pause to inquire.

There are a few cases in the reports in which such orders have been made. For example, in *Duke* v. *Clarke*,[1] where the practice was laid down, an order was extended to enable a party to levy execution for costs. One of the orders so extended was an order giving leave to issue a writ of attachment, but it does not appear to have been made ex parte in the Palatine Court: *Dunmore* v. *Wharam*.[2] But there is no reported case in which a committal order has hitherto been extended. The Vice-Chancellor's order is such an order, and it was made ex parte: "Upon motion ex parte this day made unto this court by Mr. "Cohen of counsel for the applicant . . . this court doth order "that the said respondent . . . do stand committed to Strange-"ways Gaol in the City of Manchester for his contempt in "removing . . . the above named infant who is a ward of this "court out of the United Kingdom and the jurisdiction of this "court without leave and in preventing her from being in the "custody of the applicant . . ."

The affidavit in support of the motion before the Vice-Chancellor had proved that the respondent had written a letter on April 30, 1959, stating that he was leaving with the ward for

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[10] [1900] 1 Ch. 484.

[1] [1894] W.N. 100.

[2] (1898) 67 L.J.Ch. 221.

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Israel; and there was evidence that they had left for Israel on that day. The affidavit sworn in support of this application does not give any reason for supposing that the respondent father intends to come within the jurisdiction of this court. It merely states: "4. I verily believe that the said order operates only "within the jurisdiction of the Court of Chancery of the County "Palatine of Lancaster and that unless the said order is enlarged "by this honourable court the respondent may return with "impunity to any part of the United Kingdom which is not "within the jurisdiction of the Court of Chancery of the County "Palatine of Lancaster. 5. For the aforegoing reasons I verily "believe that it is desirable and necessary that the aforesaid "order of the Court of Chancery of the County Palatine of "Lancaster be made an order of this honourable court."

As I have a discretion to exercise on this ex parte application, I have come to the conclusion that I ought not to extend an ex parte committal order unless I should have jurisdiction myself to make such an order in the circumstances prevailing, not on May 8, but today; and, in my judgment, I should not have jurisdiction to do so.

Under the old Chancery practice, leave to issue a writ of attachment could be obtained ex parte, but an order for committal never could. A writ of attachment was and is appropriate to enforce an order to do something. An order for committal was and is appropriate to punish disobedience consisting of doing something which ought not to be done: see *In re Evans*,[3] and the certificate of Mr. Registrar Lavie there set out. This distinction was abolished by the Judicature Act, and R.S.C., Ord. 44, r. 2, provides: "No writ of attachment shall be issued without "the leave of the court or a judge, to be applied for on notice "to the party against whom the attachment is to be issued"; and the procedure now in force in the Chancery Division of this court is embodied in R.S.C., Ord. 52, r. 3, as follows: [His Lordship read the rule and continued:]

Counsel for the applicant relied on *Favard* v. *Favard*[4] and *O'Donovan* v. *O'Donovan*.[5] *Favard* v. *Favard*[6] was a motion for a writ of attachment. There is and was in the rules a rule (R.S.C., Ord. 68, r. 1) which provides that (with an immaterial exception) "nothing in these Rules . . . shall affect the procedure or practice in . . . (*d*) proceedings for Divorce or other

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[3] [1893] 1 Ch. 252; 9 T.L.R. 108.

[4] (1896) 75 L.T. 664.

[5] [1955] 1 W.L.R. 1086; [1955] 3 All E.R. 278n.

[6] 75 L.T. 664.

"Matrimonial Causes." Endowed, accordingly, with a freedom with which I am not endowed, the President proceeded to apply to a writ of attachment the old Chancery practice which allowed an ex parte application, saying [7]: "I do not see how this court "can have more power than the Court of Chancery possessed." The ratio decidendi of that case [7] might have led to an expectation that, where an ex parte committal order was asked for in the Probate, Divorce and Admiralty Division it would be refused, because that was not allowed even by the old Chancery practice. This did not happen in *O'Donovan* v. *O'Donovan* [8] or, apparently, in *Phillips* v. *Phillips*.[9] But I do not enjoy the freedom which those judges all had. I am bound by the rules, and I have no jurisdiction to order committal or attachment ex parte unless satisfied that "the delay caused by proceeding in the ordinary "way would or might entail irreparable or serious mischief."

I am not satisfied of this. The difficulty will be to find the respondent within the jurisdiction of this court, if he ever comes within it; and this will be so whether I accede to or refuse the present application. If the applicant takes the appropriate steps promptly when he is found, he will not have come here with impunity.

Therefore, I should have no jurisdiction to make an ex parte committal order myself in the circumstances in evidence today; and, as that is so, I am not prepared to extend to cover this jurisdiction an ex parte order made in another jurisdiction. I would adopt a few words from the judgment of Lindley L.J. in *In re Evans* [10]: "It seems a strong thing to put a man in prison "without his having notice of the application." The motion is accordingly dismissed.

Motion dismissed.

Solicitors: *Hatchett, Jones & Co. for Theo. M. Cohen, Manchester.*

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[7] 75 L.T. 664, 665.

[8] [1955] 1 W.L.R. 1086.

[9] [1955] 1 W.L.R. 1087n.

[10] [1893] 1 Ch. 252, 265.

1959
June 10,
11, 19.

Danckwerts J.

In re SUTHERLAND, DECD.
WINTER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[1958 S. No. 1143.]

Revenue—Estate duty—Valuation—Shares—" Contingent liabilities "—Control of company by deceased—Company in receipt of capital allowance in respect of assets leaving expenditure unallowed—Sale by company of assets after death of deceased giving rise to balancing charges — Balancing charges resulting in additional assessments to income tax and profits tax — Whether additional assessments " contingent liabilities "—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 50 (1), 55 (1) (2) (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch. II, Pt. I*)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 292 (1), 297.

The deceased had control of a company within the meaning of section 55 of the Finance Act, 1940, during the five years ending with his death on March 29, 1953, so that the shares which he held in the company fell to be valued for estate duty purposes by reference to the net value of the company's assets pursuant to sections 50 and 55 of the Act of 1940. The assets of the company included five ships for which, at the deceased's death, the company had received capital allowances under Part X of the Income Tax Act, 1952, leaving a sum as " expenditure unallowed " as defined by section 297 of the Act of 1952. The ships were sold during the period November, 1953, to February, 1954, for a sum greater than the expenditure unallowed, and this gave rise to balancing charges under section 292 of the Act of 1952, resulting in additional income tax and profits tax assessments at the current rates. On a summons to determine whether under section 50 (1) of the Finance Act, 1940,[1] as applied by section 55 (2) (*a*) of that Act, any allowance could be made for the balancing

[Reported by MARGARET THOMAS, Barrister-at-Law.]

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[1] Finance Act, 1940, s. 50: " (1) In determining the value of the " estate for the purpose of estate duty " the provisions of subsection (1) of " section seven of the Finance Act, " 1894, as to making allowance for " debts and incumbrances shall not " have effect as respects any debt or " incumbrance to which assets of the " company passing on the death by " virtue of section forty-six of this " Act were liable, but the commis- " sioners shall make an allowance " from the principal value of those " assets for all liabilities of the com- " pany (computed, as regards liabili- " ties which have not matured at the " date of the death, by reference to " the value thereof at that date, and, " as regards contingent liabilities, by " reference to such estimation as " appears to the commissioners to be " reasonable) . . ."

S. 55 (as amended): " (1) Where " for the purposes of estate duty " there pass, on the death of a person " dying after the commencement of " this Act, shares in or debentures of " a company to which this section " applies, then if—(*a*) the deceased

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charge (giving rise to income tax and profits tax) in valuing the shares of the company for estate duty purposes at the deceased's death:—

Held, that the words "contingent liabilities" in section 50 (1) of the Act of 1940 were limited to a conditional event under an existing obligation, and that there could be no such liability when the events which had to occur before the charge could arise had still to happen; and that since at the date of the deceased's death the happening of the events which gave rise to the balancing charge were still wholly uncertain and depended upon a number of factors which might never exist for years, if at all, the balancing charge was not a contingent liability within the section and no allowance could be made.

In re Duffy [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756 applied.

ADJOURNED SUMMONS.

The following statement of the facts is taken substantially from the judgment: At his death on March 29, 1953, the deceased, Sir Arthur Munro Sutherland, was the owner of 98,700 £1 shares in the capital of B. J. Sutherland & Company Ltd., of which company he had had control during the five years ending with his death. Consequently, for purposes of estate duty, the shares had to be valued by reference to the net value of the assets of the company in accordance with the provisions of sections 50 and 55 of the Finance Act, 1940, instead of by reference to the then open market value of the shares pursuant to section 7 (5) of the Finance Act, 1894.

The assets of the company at the date of the deceased's death included five ships, the value of which at that date had been agreed with the Estate Duty Office to be £1,150,000. The cost of these ships to the company for income tax purposes had been agreed to be £847,907, and at the date of the deceased's death

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"had the control of the company at "any time during the five years "ending with his death . . . the "principal value of the shares or "debentures, in lieu of being esti-"mated in accordance with the pro-"visions of subsection (5) of section "seven of the Finance Act, 1894, "shall be estimated by reference to "the net value of the assets of the "company in accordance with the "provisions of the next succeeding "subsection. (2) For the purposes of "such ascertainment as aforesaid— "(*a*) the net value of the assets of "the company shall be taken to be "the principal value thereof estimated "in accordance with the said sub-"section (5), less the like allowance "for liabilities of the company as is "provided by subsection (1) of sec-"tion fifty of this Act in relation to "the assets of a company passing on "a death by virtue of section forty-"six of this Act, but subject to the "modification that allowance shall be "made for such a liability as is men-"tioned in paragraph (*b*) of that sub-"section unless it also falls within "paragraph (*a*) thereof. . . ."

the company had received capital allowances under the provisions of Part X of the Income Tax Act, 1952, leaving "expenditure "unallowed" (as defined by section 297 of the same Act) of £290,749. In the event of a sale of the ships for a sum in excess of the amount of such expenditure unallowed, under section 292 of the Income Tax Act, 1952, a balancing charge would be imposed of an amount equal to such excess, resulting in an assessment to income tax and profits tax at the rates appropriate to the year in respect of which such assessment was made.

The ships were in fact sold between November, 1953, and February, 1954, for sums amounting in the aggregate to £1,070,505. This gave rise to balancing charges of £548,318, resulting in an additional income tax assessment on the company for the year 1953–54 at 9s. in the pound, amounting to £246,743 2s., and an additional profits tax assessment at the rate of 22½ per cent. for the chargeable accounting period ending on March 31, 1953, amounting to £123,371 11s. The aggregate of this additional tax liability was £370,114 13s.

The executors of the deceased took out this summons to determine whether, on the true construction of section 50 (1) of the Finance Act, 1940, as applied by section 55 (2) (*a*), any allowance should be made in valuing for estate duty at the deceased's death the shares on the basis of the net value of the assets of the company by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a sale of the ships by reason of and up to the amount of the capital allowances received by the company.

Sir John Senter Q.C. and *Roderick A. Watson* for the plaintiffs. The defendants, relying on *In re Duffy*,[2] contend that no allowance should be made in respect of liabilities for balancing charges as they are not "contingent liabilities" within the meaning of section 50 (1) of the Finance Act, 1940; our contention is that *Duffy's* case [2] is not binding, since the reasoning of the Court of Appeal in that case as to income tax as an existing liability is inconsistent with that of the House of Lords in *British Transport Commission* v. *Gourley*,[3] where *Duffy's* case [4] was not referred to; further, *Duffy's* case [4] has no bearing on profits tax. In the light of *Inland Revenue Commissioners* v. *Wood Brothers*

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[2] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

[3] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[4] [1949] Ch. 28.

(*Birkenhead*) *Ltd.*[5] it is clear that the subject-matter of balancing charges is not Schedule D profits. The sole and express hypothesis on which the valuation falls to be made under section 55 of the Act of 1940 is a sale of the ships at their open market price at the time of death; it follows that it is not permissible to proceed to make other assumptions of fact. Section 7 of the Finance Act, 1894, states the allowances that may be made, and section 55 of the Act of 1940 is an express exception. Assuming, nevertheless, that the allowance for liabilities under section 55 depends on their existence in law at the relevant time, then the liabilities for balancing charges in respect of both income tax and profits tax did then so exist. Liability to income tax and profits tax depends on the charge imposing the tax and not on assessment: *per* Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners.*[6] The only bearing of the annual Finance Act on a balancing charge in respect of income tax and profits tax is for the purpose of assessment. The balancing charges were at the relevant time contingent liabilities for the purpose of section 55.

As to income tax alone: the provision imposing liability to a balancing charge in respect of income tax is section 292 of the Income Tax Act, 1952 (formerly section 17 (1) (*a*) of the Income Tax Act, 1945): *Kirkness* (*Inspector of Taxes*) v. *John Hudson & Co. Ltd.*[7] At the relevant time such a balancing charge was an existing liability; the figures were not in dispute and the market value of the ships was in excess of the written-down value for tax purposes. A hypothetical sale at the time of death is a contingency to be regarded as a matter of law as involving liability for balancing charges. It is not an accrued liability at the time of death, but section 50 provides for a contingent liability. The reasoning of the majority of the House of Lords in *Inland Revenue Commissioners* v. *Wood Brothers* (*Birkenhead*) *Ltd.*[8] is also an authority on the meaning of "income" in the Income Tax Act, 1952, with particular reference to balancing charges. As to profits tax alone: the charge arises under section 19 of the Finance Act, 1937: *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[9]; at the relevant time a balancing charge in respect of profits tax was an existing liability. Profits tax does not depend for charge on the annual Finance Act; the only effect of the Act could be to fix the rate of the tax, and even that was not done in the Finance Act, 1955.

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[5] [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53.

[6] [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88.

[7] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28.

[8] [1959] 2 W.L.R. 47.

[9] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the defendants. The question is whether the liability of the company at the date of the deceased's death was actual or contingent. It is submitted that it was not an existing legal or contingent liability, but there was a possibility of a balancing charge which would only become actual (1) on the company deciding to sell the ships, and (2) on there being in force at the date of sale legislation imposing a charge. A liability, the existence of which depends on an act in the company's own choice, cannot be a true liability. Except for the seven unexpired days of the financial year 1952–53, there was at the date of death no possibility of a charge being made unless fresh legislation were passed. *Duffy's* case [10] is determinative in this court; *British Transport Commission* v. *Gourley* [11] does not affect the reasoning of it, nor does the *Wood Brothers* case,[12] in which there was nothing to distinguish an income tax liability in respect of a balancing charge from any other kind of income tax. The plaintiffs' claim is for relief for a hypothetical balancing charge, while the section allows a claim for a contingent liability. A contingency dependent upon one's own volition cannot be a contingency; a contingency is something which may happen, while "liability" involves an obligation which, whether one wills it or not, will fall on one. The basis of *Duffy's* case [13] was the distinction between a contingent liability and a possible liability which might or might not arise.

The procedure under the Act of 1940 is that the net value of the assets of the company in accordance with section 55 are taken and then the liabilities are ascertained under section 50 and deducted. For this purpose sale in open market is assumed and the gross price is taken; the expenses of sale cannot be deducted. This notional sale is only assumed for the purpose of arriving at the gross proceeds of sale and for no other purpose.

As to the balancing charges: (1) in relation to income tax: the liability is similar to other income tax liabilities and it makes no difference that it is not a Schedule D charge and that it only arises on the passing of the annual Finance Act. Section 292 of the Income Tax Act, 1952, is the legislation in force at the date of death, but liability is only created by the passing of the annual Act. Section 301 of the Act of 1952 states how the charge is to be made, and section 323 (4) of the same Act deals with the manner of charging: *Inland Revenue Commissioners* v. *Wood Brothers (Birkenhead) Ltd.*[14] The amount on which the balancing charge is levied is not part of the trading profits; no allowance can be made for hypothetical liabilities: (2) in relation to profits tax: section 19 of the Finance Act, 1937, is not sufficient to impose profits tax liability on balancing charges; a balancing charge is not part of the profits of a trade or business. There cannot be a profits tax charge unless there is also an income tax charge.

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[10] [1949] Ch. 28.

[11] [1956] A.C. 185.

[12] [1959] 2 W.L.R. 47.

[13] [1949] Ch. 28.

In *Duffy's* case[15] the liability to tax depended upon (1) the imposition of legislation for the relevant financial year, and (2) the continuance of the company into that year. Roxburgh J.[16] put greater weight upon the second event. The present case is even stronger, since the company would only come under a liability if it chose to sell the ships. *Gourley's* case[17] was not concerned with the question whether tax to be paid in the future was a liability; if it were a decision that liability always includes liability for future income tax, not only was *Duffy's* case[18] wrongly decided but it would be possible to go beyond one year in assessing income tax liability; however, *Gourley's* case[19] is not a general decision. There is no discrepancy between the words of Earl Jowitt in *Gourley's* case[20] as to regarding the tax element and those of Lord Greene M.R. in *Duffy's* case.[21] Section 292 of the Income Tax Act, 1952, is not a charging section in the sense that it imposes a tax, and *Kirkness* v. *John Hudson & Co. Ltd.*[22] does not say that it is. If the Finance Bill is not passed, there is no liability. *Duffy's* case[23] should be followed unless the House of Lords say that it is wrong.

Stamp following. " Contingent liabilities " in section 50 has two possible constructions: either (1) a present obligation to pay on the happening of a future event which may or may not happen, or (2) a liability which one is not under at present but which one will come under if a future event happens; we submit that the former construction is correct. The section refers to all liabilities of the company, i.e., obligations for which it is now liable. A contingent right is an existing right to receive something contingently on the happening of a future event.

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[14] [1959] 2 W.L.R. 47.
[15] [1949] Ch. 28.
[16] [1947] T.R. 393.
[17] [1956] A.C. 185.
[18] [1949] Ch. 28.
[19] [1956] A.C. 185.
[20] Ibid. 203.
[21] [1949] Ch. 28, 37.
[22] [1955] A.C. 696.
[23] [1949] Ch. 28.

Sir John Senter Q.C. in reply. It is not correct to say of *Duffy's* case [23] that the reasoning of Roxburgh J. was approved by the Court of Appeal. In the *Wood Brothers* case [24] the Crown argued that the balancing charge arose by the combined effect of section 1 of the Income Tax Act, 1952, Schedule D, and the annual Finance Act. The majority of the House of Lords rejected that argument. There is nothing unreal in treating an estimation regarding the sale of the ships as a contingency.

Cur. adv. vult.

June 19. DANCKWERTS J. read the following judgment. [His Lordship stated the facts as set out above and continued:] The question raised by the originating summons is whether in valuing the assets of the company at the date of the deceased's death any deduction ought to be made in respect of a claim for additional income tax and profits tax which might arise upon a sale of the ships for an amount in excess of the expenditure unallowed in the manner in which such event afterwards happened.

The answer depends upon the true construction of sections 55 and 50 of the Finance Act, 1940. Section 55 must be read first. [His Lordship read sections 55 and 50 and continued:] The value of the assets of the company ascertained according to section 55 is to be the value of all the shares and debentures of the company so that the value of the shares passing on the death of the deceased represents, of course, an appropriate fraction of the total value.

It is unnecessary to refer to the well-known provisions of section 7 (1) and (5) of the Finance Act, 1894. The whole question turns, I think, upon the construction of the words "contingent liabilities" in section 50 of the Act of 1940. In the Oxford New English Dictionary (Murray) among the meanings given to the word "liability" are the following: "1. Law. The "condition of being liable or answerable by law or equity. "3. That for which one is liable; esp. pl. the debts or pecuniary "obligations of a person or company." And for the word "liable": "1. Law. Bound or obliged by law or equity, or in "accordance with a rule or convention; answerable for; legally "subject or amenable to."

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[23] [1949] Ch. 28.

[24] [1949] 2 W.L.R. 47.

Under the word "contingent" are given the following meanings: "2. Liable to happen or not; of uncertain occurrence "or incidence. 8. Dependent for its occurrence or character on "or upon some prior occurrence or condition. 9. Law. Dependent on a pre-contemplated probability; provisionally liable to "exist or take effect; conditional; not absolute."

At the date of the deceased's death there clearly was no presently existing liability for any balancing charge or the income tax and profits tax liabilities which would result from the balancing charge. But the section refers to liabilities which have not matured at the date of the death and to contingent liabilities. Liabilities which have not matured are obviously liabilities which are then binding upon the company, but which will not become payable until a future date. Contingent liabilities must be something different from the first-named liabilities. The liability of the company to a balancing charge and the consequential income tax and profits tax could arise from the capital allowances which had been received by the company if there was a sale of the ships, if the sale moneys exceeded the amount of the expenditure still unallowed, if the charge for a balancing charge and income tax and profits tax still remained part of the taxation for the relevant year, and if the company continued to carry on business; and the rate of income tax and profits tax would depend upon the Finance Act regulating the rates of taxation for the relevant year. All these are contingencies, and an event does not seem to me to be less a contingency because, as in the case of the sale of the ships, it is one which is brought into being at the will of the person who will become liable to the charge, and not independently of his will or decision. But if the liability at the date of the deceased's death *is* a contingent liability within the meaning of section 50 of the Finance Act, 1940, it is not, as it seems to me, to be measured by the amount of the income tax and profits tax which in fact became assessable upon the company by reason of the actual sale by the company of the ships in 1953–54. It is something which has to be estimated at the deceased's death, and presumably without knowledge of the facts of the sale which actually took place in 1953–54.

With so many contingencies of unknown result affecting the matter, the proper estimation (which is referred to the commissioners) is obviously a matter of extreme difficulty. But the even more difficult contingencies of the rates of income tax and the circumstances of the relevant taxpayer were not considered beyond the abilities of a jury in deciding the amount of damages for personal injury by the House of Lords in *British Transport Commission* v. *Gourley.*[1]

I can see that, viewing the matter from the date of the deceased's death, when there might not be a sale of the ships for years, or, I suppose, at all, the price must be quite unknown, and as the continuance of the provisions for balancing charges, and the rates of income tax and profits tax are matters dependent upon the will of Parliament, the estimation of the prospective liability (if any) must be a matter of the greatest difficulty. But I have difficulty in seeing why these are not all contingencies of one sort or another and why the liability which might arise therefrom is not a contingent liability.

The substantial point which remains is whether I am bound by the decision of the Court of Appeal in *In re Duffy* [2] nonetheless to reject the contentions of the plaintiff executors in the present case and give judgment for the defendants. In *In re Duffy* [2] the point was whether income tax payable at the standard rate for the financial year 1943–44, assessed by reference to the profits of the year 1942–43, during which the deceased died on June 24, 1942, was a contingent liability of the deceased's company for the purposes of sections 50 and 55 of the Finance Act, 1940 (the same sections as those which are relevant in the present case). Lord Greene M.R. said [3] that once the point in the controversy was properly appreciated, he did not find that it was a particularly difficult one to deal with. I think that I appreciate the point in the present controversy sufficiently, but I do not find the solution particularly easy.

The argument in favour of allowance against the company's assets of the amount of the income tax assessment is stated by Lord Greene as follows [4]: "What is said is this: The profits "earned in the year during which the deceased died will form "the basis of the assessments for income tax in respect of the "next year. Therefore, the profits which are earned during that "year in which the deceased died carry, so to speak, in gremio "a liability for tax in respect of the financial year which will "only begin after the death of the deceased."

Lord Greene treats the question as one of the construction of the word "liabilities." He says [5] (referring to section 50 (1) of the Finance Act, 1940): "The words in brackets deal with "two sub-classes of liabilities. Neither of those sub-classes can "go beyond the head class of liabilities. In other words, in order "to fall within one or other of those two sub-classes, a thing "must be a liability. Those two sub-classes are as follows: "firstly, the liabilities 'which have not matured at the date of "'the death.' That has a very simple meaning. The other "class is as regards 'contingent liabilities,' which are to be "valued by reference to an estimate. In that context what I "have to ask myself is this: What is the meaning of 'liabilities,' "and, in particular, what is its meaning in the phrase 'contin"'gent liabilities'? It is to that simple point that this "controversy comes down."

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[1] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[2] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

[3] [1949] Ch. 28, 32.

[4] Ibid. 33.

[5] Ibid. 36.

Then, after referring to certain arguments of counsel on the nature of income tax, Lord Greene puts his conclusion in these words[6]: "But, quite apart from all these considerations, taking "the construction of these words, I find it impossible to give "them a meaning extending beyond what is always perfectly "ascertainable without any doubt whatsoever, namely, an "existing legal liability, actually existing in law at the relevant "date. The words cannot be stretched so as to cover something "which in a business sense is morally certain and for which "every business man ought to make provision but which in law "does not become a liability until a subsequent date." Somervell and Evershed L.JJ. concurred in this judgment.

I must confess that I feel doubt whether Lord Greene's judgment did not concentrate unduly on the word "liability" to the exclusion of the qualifying (and, I should have thought, extending) adjective "contingent," but I think I can appreciate what was in his mind. Some of the meanings attributed to the word "contingent" in the dictionaries certainly suggest that a possibility would satisfy the intention of the word. But Lord Greene plainly suggests that the meaning should be limited to a conditional event under an existing obligation (in the same way perhaps, for instance, in the case of rights that an interest under the will of a deceased person may be contrasted with the mere spes successionis of the heir of a living person). Anyhow, as it seems to me, it is a definite construction put by the Court of Appeal upon the material section on which the present case depends, and I must, I apprehend, treat it as binding upon me.

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[6] [1949] Ch. 28, 37.

It was argued that the language of the Court of Appeal in *In re Duffy* [7] was quite inconsistent with that of the House of Lords in *British Transport Commission* v. *Gourley.*[8] But there does not appear to have been any consideration of *In re Duffy* in the latter case, and the subject-matter was, of course, different. I do not think that I can regard the decision of the Court of Appeal in *In re Duffy* as no longer binding, and I feel that I am compelled to apply the interpretation which the Court of Appeal put upon the expression " contingent liabilities."

A great deal of the argument before me was devoted to the question which were the sections which imposed the charge, and as to the distinction between liability and assessment. Reliance was placed on passages in *Inland Revenue Commissioners* v. *Wood Bros. (Birkenhead) Ltd.*,[9] *Kirkness* v. *John Hudson & Co. Ltd.*,[10] *Inland Revenue Commissioners* v. *Butterley Co. Ltd.*[11] and *Whitney* v. *Commissioners of Inland Revenue*,[12] as well as *British Transport Commission* v. *Gourley.*[13] I did not find, however, any of the passages, when lifted out of the different contexts in which they appeared, in any way conclusive in regard to the question to be decided in the present case.

Further, the existence at the death of the deceased of sections (in the present case section 55) which will impose a charge in certain events does not really carry the problem any further. It is still necessary that the events shall occur before the charge under the statute can come into existence. Thus one is driven back to the basic question: Is it proper to say that there is a contingent liability under the charging sections when the events which must occur before the charge can arise have still to happen, and such happening is still wholly uncertain and is dependent upon a number of factors which may never exist for a number of years, if at all?

The Court of Appeal have said that in such a situation there is no liability, even of a contingent nature, and, as I see it, their view is binding upon me and I must follow it. If I have misinterpreted the view of the Court of Appeal in this matter, the

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[7] [1949] Ch. 28.

[8] [1956] A.C. 185.

[9] [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53.

[10] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28

[11] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

[12] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88.

[13] [1956] A.C. 185.

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position will have to be corrected in a higher court. I must answer the question asked in the summons by saying that no allowance ought to be made.

Order accordingly.

Costs for the defendants.

Solicitors: *Hyde, Mahon & Pascall for Keenlyside & Forster, Newcastle-upon-Tyne; Solicitor of Inland Revenue.*

MITCHELL AND EDON (INSPECTORS OF TAXES) *v.* ROSS.

MITCHELL AND HADDOCK (INSPECTORS OF TAXES) *v.* HIRTENSTEIN.

MITCHELL AND MELLERSH (INSPECTORS OF TAXES) *v.* MARSHALL.

TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.

TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES) *v.* DREW.

1959
May 5, 6, 7, 8;
July 21.

Upjohn J.

Revenue —Income tax — Employment — Medical specialist — National Health Service—Part-time appointment with regional hospital board —Assessment—Whether appointment an " office "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schs. D, E* (*as amended by Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18); *Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 122, 156.

The National Health Service Act, 1946, " An Act to provide " for the establishment of a comprehensive health service for " England and Wales and for purposes connected therewith," by section 3 (1), laid upon the Minister of Health the duty to provide, inter alia, the services of specialists, whether at a hospital, a health centre, a clinic, or at the home of the patient. The Minister carried out his duties by delegating certain of them to Regional Hospital Boards which, subject to regulations and directions made by the Minister, administered the hospital and specialist services in their area and appointed the officers required to be employed for those purposes. The Act provided that such officers should be officers of the board and that their remuneration, subject to regulations, was to be determined by the board; two categories, consultants and senior hospital medical (or dental) officers, constituted the

[Reported by MARGARET THOMAS, Barrister-at-Law.]

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MITCHELL AND MELLERSH (INSPECTORS OF TAXES) *v.* MARSHALL.
TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.
TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES) *v.* DREW.

"specialists" of the service. Specialists might hold whole or part-time appointments; they might have private patients, undertake "locum tenens" work in respect of a National Health Service appointment and lecture to students. In addition to their ordinary duties they might make domiciliary visits to patients within the area laid down in their contract; for such visits a specialist took his own apparatus to the patient's home, examined him and reported to the general practitioner.

Five specialists holding part-time appointments under the National Health Service appealed to the special commissioners against, inter alia, certain assessments to income tax under Schedule E on the ground that in computing their profits or gains for the relevant years their remuneration in respect of such appointments, and payments made in respect of domiciliary visits to patients under the service, had been wrongly included and should have been assessed under Case II of Schedule D. The commissioners found that the part-time appointments were offices within the meaning of Schedule E to the Income Tax Act, 1918,[1] and section 156 of the Income Tax Act, 1952, and that the remuneration therefrom accordingly came under the dominance of that schedule, but that since the appointments were a necessary part of the exercise of their profession by the specialists and merely incidental thereto the remuneration fell to be assessed as part of their professional earnings under Schedule D.[2] On appeal by the Crown:—

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[1] Income Tax Act, 1918, Sch. E: "Tax under Schedule E shall be "charged in respect of every public "office or employment of profit. . . . "6. The tax shall be paid in respect "of all the public offices and "employments of profit . . . herein-"after respectively described, namely ". . . (*k*) all other public offices, or "employments of profit which are of "a public nature."

Finance Act, 1922, s. 18: "Such "profits or gains arising or accruing "to any person from an office, "employment or pension as are, "under the Income Tax Act, 1918, "chargeable to income tax under "Schedule D . . . shall cease to be "chargeable under that schedule and "shall be chargeable to tax under "Schedule E, and the rules applic-"able to that schedule shall apply "accordingly subject to the provisions "of this Act."

Income Tax Act, 1952, s. 156: "The Schedule referred to in this "Act as Schedule E is as follows— "Schedule E: 1. Tax under this "Schedule shall be charged in respect "of every public office or employment "of profit. . . . 2. Tax under this "Schedule shall also be charged in "respect of any office, employment or "pension the profits or gains arising "or accruing from which would be "chargeable to tax under Schedule D "but for the proviso to paragraph 1 of "that Schedule."

[2] Income Tax Act, 1918, Sch. D, para. 1: "Tax under this Schedule "shall be charged in respect of— "(*a*) the annual profits or gains aris-"ing or accruing— . . . (ii) to any "person . . . from any trade, profes-"sion, employment, or vocation. . . ."

Income Tax Act, 1952, s. 122: "The Schedule referred to in this Act "as Schedule D is as follows— "Schedule D: 1. Tax under this "Schedule shall be charged in respect "of—(*a*) the annual profits or gains "arising or accruing— . . . (ii) to any "person . . . from any trade, profes-"sion, employment or vocation . . . "Provided that profits or gains "arising or accruing to any person "from an office, employment or pen-"sion shall not, by virtue of this

Held, (1) that a specialist carrying out his duties under a part-time National Health Service appointment was not rendering services as a private professionally skilled and qualified individual to a private citizen, but was the instrument of the Minister of Health in carrying out his duty to provide the service; he was thus carrying out a public function and was the holder of a public office, the profits or gains from which fell to be assessed under Schedule E, and the expenses attendant thereon must be deducted under the rules applicable to that schedule. The fact that the exercise of that office might be described as an incident of the profession of a medical specialist did not alter the position; a specialist when carrying out his National Health Service duties was performing the duties of an office the profits or gains from which fell to be assessed under Schedule E, and when attending private patients was exercising his profession, the profits or gains from which were to be assessed under Schedule D.

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(2) That the making by a specialist of domiciliary visits within the area of the board concerned was part of the exercise of the public office held under the Act, and that in carrying out the work of a locum tenens in respect of a National Health Service appointment a specialist was for the time being exercising the functions and holding the public office of another, so that the remuneration from those offices also must be assessed under Schedule E, and the expenses attendant thereon deducted under the rules applicable to that schedule. The commissioners, accordingly, had come to a wrong decision.

McMillan v. *Guest* [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190; *Razzel* v. *Snowball* [1954] 1 W.L.R. 1382; [1954] 3 All E.R. 429, and dictum of Lord Atkin in *Fry* v. *Salisbury House Estate Ltd.* [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266 applied.

Davies v. *Braithwaite* [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198 and *Household* v. *Grimshaw* [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366 distinguished.

APPEALS from the Commissioners for the Special Purposes of the Income Tax Acts.

The first and main appeal was in respect of Dr. Harold Leslie Ross, who for the relevant years of assessment held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal was in respect of Dr. Arnost Hirtenstein, who held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board, and also undertook certain lecture work to nurses. The third appeal was in respect of Dr. Alfred Gordon Marshall, who

"paragraph, be chargeable to tax "under this Schedule unless they are "chargeable to tax under Case V of "this Schedule or under Chapter IV "of Part VII of this Act."

held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal was in respect of Dr. Herman Peter Tarnesby, who held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of National Health appointments. The fifth appeal was in respect of Charles Edwin Drew, who held three appointments as a consultant thoracic surgeon, one with the Westminster Hospital, a teaching hospital, another with the South West Metropolitan Regional Hospital Board, and the third as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of National Health appointments and in addition lectured to medical students.

The consultants all had private patients.

The following are extracts from the case stated, as amended, in respect of Dr. Ross; the other cases, which raised similar questions of principle, are not set out.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on March 23, 26, 27, 28, and April 23, 24, 25, 1956, and April 23, 1957, Dr. Harold Leslie Ross (hereinafter called " the respondent ") appealed against assessments to income tax under Schedule E for the years 1951–52, 1952–53, and 1953–54, and under Schedule D for the years 1952–53, 1953–54, and 1954–55.

The grounds of the appeal were, first, as regards the assessments made under Schedule E, that in computing the profits or gains of the respondent for the accounting periods relative to the assessments under appeal his remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary to law, and that the assessments should be reduced accordingly, and, secondly, as regards the assessments made under Schedule D, that the assessments being estimated should be adjusted in accordance with the accounts of the profits or gains of the respondent for the accounting periods relative to the assessments. . . .

3. The following conclusions of mixed fact and law were agreed between the parties and admitted at the hearing of the appeal: (1) The National Health Service Act, 1946 (" the Act ") laid upon

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the Minister of Health ("the Minister") the duty to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness; and for that purpose the Minister was under a duty to provide or secure the effective provision of services in accordance with the Act [s. 1 (1) (2)]. . . .

(3) The services provided were the following: (i) hospital and specialist services [Part II]; (ii) health services provided by local health authorities [Part III]; (iii) general medical and dental services, pharmaceutical services and supplementary ophthalmic services [Part IV]; and in addition Part V of the Act contained special provisions as to Mental Health Services. . . .

(5) The Act required the Minister as from the appointed day (July 5, 1948) to provide throughout England and Wales, to such extent as he considered necessary to meet all reasonable requirements, accommodation and services of the following descriptions: (a) hospital accommodation; (b) medical, nursing and other services required at or for the purposes of a hospital; (c) the services of specialists, whether at a hospital, a health centre provided by a local health authority under Part III of the Act, or a clinic, or, if necessary on medical grounds, at the home of the patient. Accommodation and services so provided were referred to as "hospital and specialist services" [s. 3 (1)]. . . .

(11) Subject to the exercise of functions by hospital management committees, it was the duty of a regional hospital board, "subject to and in accordance with regulations and such directions as may be given by the Minister, generally to administer on behalf of the Minister the hospital and specialist services provided in their area," and, in particular, to appoint officers required to be employed at or for the purposes of any hospital providing such services, other than a teaching hospital [s. 12 (1)]. . . .

(14) It was the duty of the board of governors of every teaching hospital, in accordance with regulations and such directions as might be given by the Minister, generally to manage and control the hospital on behalf of the Minister, and in particular to appoint officers required to be employed at or for the purposes of such hospital [s. 12 (3)]. . . .

(17) The qualified medical staff of the hospital service was divided into a number of different categories, two of which were:

(a) consultants; (b) senior hospital medical (or dental) officers. These two categories constituted the " specialists " of the service. The other categories were mainly of junior grades generally consisting of whole-time officers, many of whom were required to reside at the hospitals where they worked.

(18) The Act provided that all officers employed for the purposes of any hospital providing hospital and specialist services, other than a teaching hospital, should be officers of the regional hospital board for the area in which the hospital is situated; that all officers employed for the purpose of a teaching hospital should be officers of the board of governors of that hospital; and that the remuneration of all such officers should, subject to regulations, be determined by the regional hospital board or the board of governors concerned [s. 14 (1)]. By section 79 (1) of the Act the word " officer " included servant.

(19) Some of the consultants in the service held whole-time appointments. The great majority of the consultants, however, only held part-time appointments. . . .

(23) Before any formal regulations were made under section 66 of the Act, there had been negotiations between the Minister and the professional negotiating committee concerned, and between whom terms and conditions of service were worked out for hospital medical and dental staff based on the recommendations contained in what came to be known as the " Spens Specialist Report," and eventually the Minister published a printed document, dated June 7, 1949, containing such terms and conditions. That document was described as " Terms and Conditions of Service of " Hospital Medical and Dental Staff (England and Wales) " (" the Terms of Service "). [Ministry of Health Report, 1950, Command 8342, p. 14]. . . .

(25) It was not until 1951 that formal regulations under section 66 of the Act were made by the Minister. Those were called the National Health Service (Remuneration and Conditions of Service) Regulations, 1951 [S.I. 1951, No. 1373], and were in very general form. . . .

(27) The Terms of Service set out the method by which the remuneration of the part-time consultant should be calculated. The average amount of time required to perform the duties attaching to the post was first assessed in terms of hours per week. That aggregate number of estimated hours per week was then divided by $3\frac{1}{2}$, so as to give a figure of " notional half-days " (also called " sessions ") per week for which the consultant would

be employed, and the remuneration of the part-time consultant was then obtained. . . . The Terms of Service provided for the fees payable for exceptional consultations, and for fees payable for locum tenens work.

(28) The Terms of Service related to remuneration in respect of domiciliary consultations. . . . Domiciliary work was quite independent of and different from the part-time consultant's work under his ordinary appointment with the regional hospital board. The domiciliary consultation was a visit by the consultant to a patient in his home at the request of the patient's general practitioner. . . .

(30)–(34) The Terms of Service dealt with private practice and retention of fees, and provided for retirement age. Normally that was 65, but there were provisions for extending it to 70, and for continuing in an honorary capacity. They gave the consultant the right to appeal to the Minister, if he thought the appointment was unfairly terminated, and dealt with the question of leave: part-time consultants were entitled to leave on the specified basis. They also gave the right to reimbursement of travelling, subsisting and other expenses to the specified extent.

(35) A part-time consultant (whether honorary or paid) on the staff of a hospital providing hospital and specialist services might make arrangements for the treatment of his private patients at that or any other such hospital, and . . . the hospital made the special accommodation available for that purpose [s. 5 (2)]. . . .

(45) All general practitioners were assessed under Case II, Schedule D, in respect of their general practice in the service.

4. Apart from and in addition to the foregoing, the special commissioners found the following facts admitted or proved on the evidence adduced at the hearing of the appeal: (1) In the medical profession the normal way in which an individual became recognised as a "consultant" was by being appointed to the staff of a hospital as physician or surgeon (or a corresponding post). This was a recognition of his professional ability. The work of a consultant was the practice of his own special branch of medicine on cases sent to him by other doctors. Before the introduction of the National Health Service it was usual for consultants to have a private practice as such apart from their hospital appointments. Except in the case of hospitals run under the Public Health Act, 1936, and ex gratia payments from voluntary hospitals, it was not usual for consultants to receive payment for their hospital work. After the introduction of the

National Health Service, consultants taking part in this service were paid in the manner hereinbefore referred to, but it remained the usual practice for part-time consultants to have a private practice as such, apart from their hospital appointments, though the volume of private work throughout the country declined. Apart from geographical limitations, consultants were free to take up part-time appointments with different regional hospital boards, payment being received from each in accordance with the amount decided by the Central Bureau, London, but subject to the maximum remuneration for part-time appointments laid down in the Terms and Conditions of Service of Hospital, Medical and Dental Staff (England and Wales).

(2) Both before and after the introduction of the National Health Service, the holder of an appointment on the staff of a hospital obtained definite advantages therefrom, in that it gave him professional prestige, and provided him with plenty of opportunity for developing and perfecting his skill. After the introduction of the National Health Service only those consultants who took part in that scheme were permitted to take a patient into a private bed in any of the hospitals under the Ministry of National Health and thus obtain for him the services of the nursing staff and the use of the apparatus in the hospital. The same facilities were available at only a few nursing homes.

(3) At all material times the respondent was a registered medical practitioner in the United Kingdom, specialising in radiology. He was a Bachelor of Medicine, a Bachelor of Surgery, a Master of Radiology, and held a diploma in Medical Radio Diagnosis.

(4) On March 1, 1950, he commenced a private practice as a consultant radiologist.

(5) On March 1, 1950, the respondent obtained a part-time appointment as a consultant radiologist under the Birmingham Regional Hospital Board to the hospital of St. Cross, Rugby, the Keresley Hospital and the Gulson Hospital. The terms of the appointment were set out in a letter which contained a schedule detailing the hospitals and hours of work required at each. At the end of the letter a form of acceptance was attached which the respondent signed. Also attached to the letter was a form of undertaking in connection with domiciliary consultations which the respondent signed. . . .

(6) The respondent interviewed his private patients either at his consulting rooms, or at any of the hospitals to which he was

attached, or in nursing homes, or in their own private homes. At his consulting rooms at his house the respondent kept for professional purposes a desk, filing cabinets, portable X-ray apparatus, screens, a typewriter, telephone and a library of books of reference. He also had a dark room for developing films. The respondent also had a car which he used in his professional duties. When the respondent required the use of hospital apparatus and film for a private patient in hospital he paid a fee of two guineas.

(7) The respondent also had need of and employed secretarial assistance in his private practice and also in connection with his undertaking to carry out domiciliary visits. The services of a secretary were also useful in connection with his hospital work and for receiving telephone calls from the hospitals. . . .

(8) Upon taking up his appointment under the Birmingham Regional Hospital Board, the respondent contacted the consultant radiologist at the hospital of St. Cross, Rugby, and arranged with him the best way of covering the radiological work at Rugby. It was agreed between them that the respondent should do two sessions at Gulson Hospital and seven sessions at St. Cross Hospital, but that the work at Keresley Hospital should be done by the other consultant radiologist in Rugby and by the consultant radiologist in Coventry. No permission was sought from or given by any of the administrative officials of the hospital for this arrangement.

(9) The respondent was solely responsible for the radiological work at St. Cross Hospital, Rugby, which he attended on four mornings a week. During this time he attended to National Health Service patients . . . and also to private patients, either in the paying bed section of the hospital, the private wing, or private out-patients. . . .

(10) At Gulson Hospital three consultant radiologists, including the respondent, were responsible for the radiological work which they arranged between them to their mutual convenience so as to dovetail in their work at the hospital. . . . The respondent was entirely responsible for deciding what radiological work he should do and how he should do it.

(11) A domiciliary visit was usually inaugurated by a telephone message from a general practitioner to the respondent's house which was received by his secretary. Upon receipt of such message the respondent loaded his portable X-ray apparatus into his car and proceeded to the place of consultation. After taking the necessary pictures the respondent returned either to hospital or

to his consulting rooms and proceeded at once to develop the film himself (usually in hospital). He usually informed the general practitioner concerned of the result the same day. The film used for domiciliary visits was provided by the Ministry of Health, and that used for private patients by the respondent himself. Domiciliary visits were usually undertaken between 5.30 and 8.30 p.m., i.e., after the afternoon session at a hospital, and at a time when general practitioners could very often be present. For each domiciliary visit carried out, up to a maximum of 200 in any year, the respondent received a fee of four guineas plus two guineas for the use of his apparatus; the latter fee being payable only once per patient. . . .

5. It was contended on behalf of the respondent: (i) that the activities of the respondent as a consultant radiologist constituted the carrying on of a profession and the entirety of the profits and gains arising from those activities was therefore assessable to income tax under Case II of Schedule D and not otherwise; (ii) that the part-time appointments held by the respondent were not offices or employments within the meaning of Schedule E; (iii) that if any such part-time appointment was an office or employment within the meaning of Schedule E the tenure thereof was an incident in the course of the carrying on by the respondent of his profession as a consultant radiologist, and any remuneration arising therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof for the purposes of assessment to income tax under Schedule D; and, accordingly, (iv) that the assessments under Schedule E should be reduced accordingly, and the assessments under Schedule D should be adjusted to correspond with the figures shown in the respondent's accounts; and in the alternative (v) that if the assessments under Schedule E were in principle well founded, the outgoings shown in the respondent's accounts were allowable deductions in computing the profits or gains of the respondent assessable under Schedule D, in so far as they were not allowable as expenses under Schedule E; and, in any event, (vi) that any profits or gains arising to the respondent in respect of domiciliary visits were proper to be regarded as profits or gains of his profession assessable under Schedule D and not as emoluments of offices or employments assessable under Schedule E.

6. It was contended on behalf of the appellants: (i) that the respondent's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included

in the assessments in question made upon him under Schedule E; (ii) that the payments made to the respondent by the said board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by the respondent in respect of an office or employment of profit within the meaning of Schedule E; (iii) that the respondent exercised a profession or vocation in respect of which he was assessable under Case II, Schedule D, only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that in computing the profits of the respondent under Schedule E in respect of his said part-time appointment only such expenses as were allowable under the said Schedule and the rules applicable thereto were deductible, and in computing the profits or gains of the respondent under Case II, Schedule D, in respect of his said private practice only such expenses as were allowable under the schedule and case and the rules applicable thereto were deductible, and the outgoings shown in the respondent's accounts fell to be dealt with accordingly; (v) that the payments made to the respondent under the National Health Service Scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Schedule E and not as profits or gains assessable under Schedule D; and (vi) that the appeal should be dismissed and the assessments confirmed or adjusted in accordance with the appropriate figures.

7. The commissioners gave their decision in principle on July 31, 1956, in the following terms: . . .

(4) Upon consideration of the evidence adduced and arguments addressed to us on behalf of the parties, we find that each of Dr. Ross' part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office, and the remuneration derived therefrom, together with the fees received in respect of domiciliary consultations carried out in connection therewith was the profit of an office within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952. It is immaterial for the purpose of determining this appeal to find whether or not such office is a public office within the meaning of the charging rule of Schedule E of the Income Tax Act, 1918, and section 156 of the Income Tax Act, 1952, and we express no opinion. Furthermore, finding as we

do that the part-time appointments which Dr. Ross held as aforesaid constituted the holding of offices, it is unnecessary for the purpose of determining this appeal to find whether or not the hospital appointments also constituted an employment within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952, and again we express no opinion. We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general.

(5) We next have to decide the correct method of assessing the profits or gains which Dr. Ross derived from his hospital appointments. Having regard to the decision in *Fry* v. *Salisbury House Estate Ltd.*[3] and, in particular, to the judgment of Lord Atkin,[4] it would seem, prima facie, that remuneration received by Dr. Ross from his various hospital appointments, being, as we have found, derived from the holding of offices, must come under the dominance of Schedule E, to the exclusion of other Schedules, neither Dr. Ross nor the Crown having any option in the matter. We have, however, to consider what effect, if any, the decisions in the cases of *Davies* v. *Braithwaite*[5] and *Household* v. *Grimshaw*[6] have upon this view. In the first place, the *Salisbury House Estate* case[7] can, we think, be distinguished because it dealt only with the mutual exclusiveness of Schedules A and D, whereas the cases of *Braithwaite*[8] and *Household*[9] were concerned with professional earnings falling within Schedule D and Schedule E. In the second place, the *Braithwaite*[10] and *Household*[11] cases were decided after the decision in the *Salisbury House Estate* case[12] had been given and we are, therefore, entitled to assume that they are reconcilable with the latter. We think that the decisions in the cases of *Braithwaite*[13] and *Household*[14] are authority for the principle that an individual may have an engagement or hold a post in the same line as his profession at large,

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[3] [1930] A.C. 432, 457: 46 T.L.R. 336; 15 T.C. 266.

[4] Ibid.

[5] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[6] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

[7] [1930] A.C. 432.

[8] [1931] 2 K.B. 628.

[9] [1953] 1 W.L.R. 710.

[10] [1931] 2 K.B. 628.

[11] [1953] 1 W.L.R. 710.

[12] [1930] A.C. 432.

[13] [1931] 2 K.B. 628.

[14] [1953] 1 W.L.R. 710.

but that the contract governing such engagement or post may nevertheless be nothing but an incident in the conduct of his professional career. In such a case we think we would be bound by the authorities to hold that the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Schedule D. Applying this principle to our findings in the present case, we hold that the remuneration received by Dr. Ross from his various part-time hospital appointments falls to be assessed under Case II of Schedule D as part of the profits or gains of his profession, and so also do the fees received by him in respect of domiciliary consultations.

(6) The appeal therefore succeeds against the Schedule E assessments in so far as they relate to Dr. Ross' personal remuneration, and it is unnecessary for us to consider further what, if any, expenses incurred by Dr. Ross would fall to be set against such assessments. We adjourn the appeal against the remaining assessments for consideration and agreement of the figures by the parties on the basis of this our decision in principle.

The Crown appealed; the point of law stated for the opinion of the High Court being whether on the facts found by the commissioners there was any evidence upon which they could properly arrive at their decision, and whether on the facts so found their determination of the appeal was correct in law.

R. O. Wilberforce Q.C., *E. B. Stamp* and *Alan S. Orr* for the Crown. The specialists have two sources of earnings, that of the office or employment under the National Health Service and that of the profession which includes the private practice. The earnings from the former ought to be assessed under Schedule E and from the latter under Schedule D; the earnings from the former cannot be removed into Schedule D by showing that the specialists also exercise a profession, since the schedules are mutually exclusive: *Fry* v. *Salisbury House Estate Ltd.*[15] The fact that at the same time the specialists also carry on a profession is irrelevant, whatever the relation between the office or employment and the profession. Although there might be a case where a number of employments were held, either simultaneously or successively, so that it became a question of degree when the subject was taxable under Schedule D, this is not such a case, since there is sufficient permanence and recognisability about the employments to prevent them coming into that category. When

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[15] [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266.

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the special commissioners stated that a part-time hospital appointment was " a necessary part of the exercise of that pro-" fession . . . and merely incidental thereto," by " necessary " they meant that it would be impracticable for a specialist to establish a practice without the hospital appointments; there is no justification on the terms of the Income Tax Act, 1952, for making a distinction between offices which are or are not " incidental." [Reference was made to *Davies* v. *Braithwaite* [16]; *Household* v. *Grimshaw* [17]; *Tennant* v. *Smith* [18]; *Butler* v. *Mortgage Co. of Egypt* [19] and *Fuge* v. *McClelland*.[20]]

The National Health Service Act uses " employment " in relation to the specialists, and the Terms of Service deal in detail with the conditions of employment. The following are possible tests for an office: (1) if the definite article is used, as, for example, I am the consultant radiologist at X hospital; (2) that an office is a substantive thing existing apart from its holder: *per* Rowlatt J. in *Davies* v. *Braithwaite* [21]; (3) the title of an office gives some idea of the duties that the holder will have to perform; (4) if a successor would naturally be appointed: *per* Lord Wrenbury in *Great Western Railway Co.* v. *Bater*.[22] The test of control is inappropriate; it is possible for a professional man to have an employment although the day-to-day details of it do not involve control. " Employment " in Schedule E has to be construed with and takes its colour from " office ": *per* Lord Wright in *McMillan* v. *Guest*.[23] Since the Act of 1946 no distinction can be made between the categories of medical staff in a hospital: *Razzel* v. *Snowball*.[24] The appointments in question should all be treated as offices on account of the dignity or independence attached, or, if not, then as employments.

F. Heyworth Talbot Q.C. and *J. L. Creese* for the taxpayers. The taxpayers have one undivided source of income, the profession, and any expenses relating to the exercise of an office or employment incidental thereto, which would not be allowable under Schedule E but which would be allowable under Schedule D, may be brought into account as part of the expenses of the general exercise of such profession. The exercise of the appointment under the National Health Service is incidental to the profession. Without the hospital appointments the specialists could not carry on the generality of their practices, and it is nihil ad rem that the expenses were also referable to appointments which the commissioners found were incidental to the generality of the practices. [Reference was made to *Hughes* v. *Bank of New Zealand*.[25]] It is difficult to support the ground on which the commissioners decided that the taxpayers were assessable to tax under Schedule D, since they held that the appointments were offices within Schedule E.

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[16] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[17] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

[18] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158.

[19] (1928) 13 T.C. 803.

[20] (1956) 36 T.C. 571.

[21] [1931] 2 K.B. 628, 633.

[22] [1922] 2 A.C. 1, 33; 38 T.L.R. 448; 8 T.C. 231.

[23] [1942] A.C. 561, 566; [1942] 1 All E.R. 606; 24 T.C. 190.

[24] [1954] 1 W.L.R. 1382; [1954] 3 All E.R. 429.

The appointments are not offices; the true characteristic of an office is that the rights and duties of the holder are not a matter of contract, as, for example, judicial and ecclesiastical offices: *In re National Insurance Act, 1911* [26]—the case of a curate. Not all doctors accept the same terms; they are a matter of ad hoc negotiation. Nor were the appointments employments. [Reference was made to *Simmons* v. *Heath Laundry Co.*[27]; *Performing Right Society Ltd.* v. *Mitchell and Booker (Palais de Danse) Ltd.*[28]] No control was exercised over these specialists. [Reference was made to *Gould* v. *Minister of National Insurance*,[29] *Collins* v. *Hertfordshire County Council*[30] and *Cassidy* v. *Minister of Health*.[31]] The contractual position of a part-time consultant is similar to that of the actress in *Davies* v. *Braithwaite*[32]; in both cases there is the obligation to render services and the use of skill and independence in the exercise of professional functions. The argument of the Crown in that case is adopted.

Before 1922, where an employment was embedded in a profession, there was no basis for a separate assessment, and by section 18 of the Finance Act, 1922, no new kind of income came into existence. If there is an office or employment and the Schedule E assessment stands, the Schedule D liability should be computed by deducting all expenses including those not allowable under Schedule E.

Creese following. A locum tenens appointment has not the same permanence as "employment"; it is one engagement in the carrying on of a profession.

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[25] [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472.

[26] [1912] 2 Ch. 563.

[27] [1910] 1 K.B. 543; 26 T.L.R. 326.

[28] [1924] 1 K.B. 762; 40 T.L.R. 308.

[29] [1951] 1 K.B. 731; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.

[30] [1947] K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.

[31] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[32] [1931] 2 K.B. 628.

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R. O. Wilberforce Q.C. in reply. *Hughes* v. *Bank of New Zealand*[33] is distinguishable; it has no bearing on questions arising between Schedules D and E. Whether an appointment is an office is a matter of impression. There must, unless the office is created by statute, be an element of contract in most offices. [Reference was made to *Dale* v. *Inland Revenue Commissioners*.[34]] It is clear that some of the public offices listed in Schedule 9, para. 5, of the Income Tax Act, 1952, are held under contract. Even before *Cassidy's* case,[35] in which the cause of action arose before the operation of the Act of 1946, the courts were moving away from the test of master and servant or independent contractor to the broader test, is the person attacked part of the permanent staff: *Roe* v. *Minister of Health*.[36] In *Gould's* case[37] Ormerod J., quoting from *Short* v. *J. and W. Henderson*,[38] listed the four indicia of a contract of service; if one omits the test of control, as one should, the other indicia are here present. Rowlatt J. in *Davies* v. *Braithwaite*[39] rejected the argument of the Crown and said that one could exercise a profession and at the same time have an employment. The obligation to make domiciliary consultations is part of the main contract.

Cur. adv. vult.

July 21. UPJOHN J. read the following judgment: I have before me five appeals from the Special Commissioners for Income Tax, and they raise questions of general importance to medical specialists; that is, whether the expenses incurred by them in rendering services to patients under the National Health Service Act, 1946 (which I shall call "the Act"), ought to be deducted under Schedule D or Schedule E of the Income Tax Acts.

As is well known, owing to the difference in wording of the relevant rules for the assessment of tax, outgoings may be deductible as expenses for the purposes of Schedule D which would not be so deductible for the purposes of Schedule E.

[His Lordship stated the names of the respondents and the appointments held by them, and continued:] The main question I have to determine is whether, when the consultants have accepted such appointments, the profits or gains arising from the appointments are profits or gains arising from an "office" or "employment" within Schedule E. The facts, the relevant statutory provisions, forms of contract and general terms of service are so fully set out in the first and main case, that I shall content myself with the barest outline of facts before turning to the law.

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[33] [1938] A.C. 366.

[34] [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671; 34 T.C. 468.

[35] [1951] 2 K.B. 343.

[36] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.

[37] [1951] 1 K.B. 731, 734.

[38] (1946) 39 B.W.C.C. 62.

[39] [1931] 2 K.B. 628.

As set out in the long title, the National Health Service Act, 1946, is "An Act to provide for the establishment of a comprehensive health service for England and Wales, and for "purposes connected therewith." [His Lordship read section 3 (1) of the Act, to which reference is made in para. 3 (5) of the main case, and continued:] The appointed day was July 5, 1948. I am concerned with section 3 (1) (*c*), the services of specialists.

The Minister, in fact, carries out his duties in the main by delegation to regional hospital boards who, in turn, may delegate certain of them to hospital management committees, but not those relating to the appointment and dismissal of specialists. In the case of teaching hospitals there is a separate board of governors for each such hospital to govern and control its activities. I shall use the word "board" to designate a regional hospital board or a board of governors of a teaching hospital indifferently.

Before the Act of 1946 came into operation the specialist, or consultant, as he was frequently called, was one who was appointed to the staff of a hospital as a physician or surgeon or some similar post. He practised in his own specialised field on cases normally sent to him by general practitioners. He would normally have private patients and his appointment to the staff of the hospital was almost invariably honorary and part-time.

When the Act came into operation all that was changed. A specialist may, if he so desires, continue to practise exclusively on private patients, but if he desires to participate in services to the public to be rendered under the Act, he must take an appointment with, and become a member of the staff of, a board. He becomes an officer of the board, but the use of that word in the relevant statutes and statutory instruments has not been relied on as throwing much light on the problem I have to decide. He may take a whole-time or part-time appointment. In either case he is remunerated for his services as may be agreed between the board and the specialist, subject to regulations made by the Minister of Health. The large majority of specialists take part-time appointments. In that event, the specialist agrees to work a certain number of sessions or notional half-days per week. All these matters are provided for in the contract into which the board and the consultant must enter. Such contract by reference to a document, referred to in paragraph 3 (23) of Dr. Ross's case stated as "the terms of service," provides for retirement of the specialist at the age of 65 (subject to extension), for an appeal to the Minister if the specialist considers his appointment is being unfairly terminated by the board, for annual leave, for reimbursement of travelling expenses, subsistence allowance, and for many other incidental matters. A specialist may take part-time appointments with more than one board, but his total maximum remuneration must not exceed nine sessions a week.

It naturally follows from the nature of the professional status of a specialist that his work is subject to no control or direction as to how he should carry out his work in the sense of prescribing particular treatment in relation to a particular patient. That appears to be so even in the case of those who are on the lowest rung of the specialist ladder. (See, for example, the case stated of Dr. Tarnesby.)

The general organisation of the work, that is, the particular hospital or hospitals within the jurisdiction of a board to be visited by each specialist and the particular hours per week to be spent at each, will probably be stated in the contract, but in practice these arrangements may be varied very informally between the consultants concerned without reference to the board. (See, for example, Dr. Ross's case stated, paragraph 4 (8).) Generally speaking, all these matters and actual days and hours of attendance are, as one would expect, normally left to arrangements to be made between the particular specialists and the hospital or hospitals concerned, to suit their mutual convenience.

I do not propose to read any of the contracts in these five cases as they are all annexed to the cases stated. Some of them vary slightly in form from the others, but nothing turns on the precise terms of the contracts in question. That is all I propose to say on the main issue, but there are certain subsidiary points with which I shall deal later.

I turn then to the law. It is necessary to look at the history of the relevant legislation. By virtue of section 1 and Schedule E of the Income Tax Act, 1918, re-enacting similar legislation in the Income Tax Act, 1842, tax was chargeable under Schedule E in respect of "every public office or employment of profit." Rule 6 of Schedule E of the Income Tax Act, 1918, sets out a long list of public offices and employments of profit, ending with a comprehensive sub-paragraph (*k*), " all other public offices or employ-" ments of profit which are of a public nature."

It was clear that the office or employment to fall within Schedule E had to be public, and it was so held by the House of Lords in *Great Western Railway Co.* v. *Bater*,[1] a decision on the corresponding rule in the Income Tax Act, 1842. In that case it was decided that a clerk in the employment of the Great Western Railway was not the holder of a public office or employment within Schedule E. Employment which did not fall within Schedule E was taxed under paragraph 1 (*a*) (ii) of Schedule D of the Act of 1918 as a profit or gain arising from " any trade, profes-" sion, employment or vocation." The law was altered after the *Bater* case by section 18 of the Finance Act, 1922, which provided (omitting immaterial words) that " Such profits or gains arising or " accruing to any person from an office, employment or pension as " are, under the Income Tax Act, 1918, chargeable to income tax " under Schedule D . . . shall cease to be chargeable under that " schedule and shall be chargeable to tax under Schedule E, and " the rules applicable to that schedule shall apply accordingly " subject to the provisions of this Act." So in the result the law now is that all offices and employments for profit, whether public or private, fall within Schedule E. The relevant law is now re-enacted to the same effect by the Income Tax Act, 1952 (see proviso to paragraph 1 of section 122 and paragraphs 1 and 2 of section 156).

There is but little authority on the meaning of the word " office." It was considered in *Bater's* case [2] and again in *McMillan* v. *Guest*.[3] In that case it was decided that a director of a private company incorporated in England holds a public office within the United Kingdom. Lord Atkin said [4]: " On the first " point there was no dispute. There is no statutory definition " of ' office.' Without adopting the sentence as a complete defini-" tion one may treat the following expression of Rowlatt J. in " *Great Western Railway Co.* v. *Bater*,[5] adopted by Lord Atkin-" son as a generally sufficient statement of the meaning of the " word: ' an office or employment which was a subsisting, per-" ' manent, substantive position which had an existence inde-" ' pendent of the person who filled it, which went on and was

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[1] [1922] 2 A.C. 1; 38 T.L.R. 448; 8 T.C. 231.

[2] [1920] 3 K.B. 266, 274; [1922] A.C. 1.

[3] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.

[4] [1942] A.C. 561, 564.

[5] [1920] 3 K.B. 266, 274.

" 'filled in succession by successive holders.' There can be no
" doubt that the director of a company holds such an office as is
" described."

Lord Wright said [6]: "The word 'office' is of indefinite con-
" tent. Its various meanings cover four columns of the New
" English Dictionary, but I take as the most relevant for purposes
" of this case the following: 'A position or place to which certain
" 'duties are attached, especially one of a more or less public
" 'character.' This, I think, roughly corresponds with such
" approaches to a definition as have been attempted in the autho-
" rities, in particular, *Great Western Railway Co.* v. *Bater*,[7]
" where the legal construction of these words, which had been in
" Schedule E since 1803 (43 Geo. 3, c. 122, s. 175), was dis-
" cussed. It was there held that the position of a clerk in a
" railway company was not an office or employment of profit of a
" public nature within Schedule E. Lord Wrenbury [8] was content
" so to hold without attempting to define what type of office or
" employment would satisfy the language of the schedule. Lord
" Sumner said [9] that to hold otherwise would be 'an abuse of
" 'language.' To hold that the director of a company such as
" A. Wander Ltd. (though it is what is called a private company)
" does not have an office within the meaning of the schedule
" would equally, in my opinion, be an abuse of language. Every-
" one, I think, would say that as director he held an office in the
" company. The word 'employment,' in my opinion, has to be
" construed with and takes its colour from the word 'office.'
" If I may adopt the words of the Master of the Rolls, it is too
" late to say that the director of a company like this does not
" hold an office within Schedule E. I do not attempt what their
" Lordships did not attempt in *Bater's* case,[10] that is, an exact
" definition of these words. They are deliberately, I imagine, left
" vague. Though their true construction is a matter of law, they
" are to be applied in the facts of the particular case according
" to the ordinary use of language and the dictates of common
" sense with due regard to the requirement that there must be
" some degree of permanence and publicity in the office."

On the question of employment a large number of authorities were cited to me. Many tests have been laid down to determine whether the relation of master and servant exists, such as the degree of control exercised by the master, and so on. The relationship between a specialist and a board is so very special, however, that many of these cases, dealing either with entirely different types of engagements (to use a neutral word) or with the pre-Act relationship between hospitals and specialists, form no safe guide.

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[6] [1942] A.C. 561, 566.

[7] [1922] 2 A.C. 1.

[8] Ibid. 35.

[9] Ibid. 25.

[10] [1922] 2 A.C. 1.

The real question to be answered is this: Does a specialist who holds a part-time National Health appointment (a) occupy an office, or (b) undertake an employment, or (c) does he merely render services in the course of the exercise or practice of his profession?

In support of the last view it was urged that a specialist may have private patients; he may have one or more National Health Service part-time appointments; he may lecture to students or nurses; he may go as a locum tenens to some medical post; these are all ways in which the specialist practises his profession and they are only incidents of it. The case, it is said, is analogous to *Davies* v. *Braithwaite*.[11] It is there held that Miss Lilian Braithwaite, who accepted many engagements on the stage, in films and on the B.B.C., was only exercising her talents as an actress, and that each of these engagements could not be considered an employment, but merely an engagement in exercising a profession.

The true nature of the relationship between a board and a specialist was considered in the Court of Appeal in *Razzel* v. *Snowball*.[12] That case decided that the Minister of Health was responsible for the negligence of a specialist, for it was the duty of the Minister under section 3 (1) (*c*) of the National Health Act, 1946, to provide treatment by means of specialists and not merely to provide the specialist.

Denning L.J. said[13]: " Mr. Bernstein [for the plaintiff] " pressed us with some observations in the cases about consul- " tants. He said the defendant was a part-time consultant, " and that a consultant was in a different position from the staff " of the hospital. I think that Mr. Cumming-Bruce [for the " defendant] gave the correct answer when he said that, whatever " may have been the position of a consultant in former times, " nowadays, since the National Health Service Act, 1946, the " term ' consultant ' does not denote a particular relationship

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[11] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[12] [1954] 1 W.L.R. 1382; [1954] 3 All E.R. 429.

[13] [1954] 1 W.L.R. 1382, 1386.

1959

MITCHELL AND EDON (INSPECTORS OF TAXES)
v.
ROSS.
MITCHELL AND HADDOCK (INSPECTORS OF TAXES)
v.
HIRTENSTEIN.
MITCHELL AND MELLERSH (INSPECTORS OF TAXES)
v.
MARSHALL.
TAYLOR-GOOBY (INSPECTOR OF TAXES)
v.
TARNESBY.
TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES)
v.
DREW.

Upjohn J.

"between a doctor and a hospital. It is simply a title denoting "his place in the hierarchy of the hospital staff. He is a senior "member of the staff, but nevertheless just as much a member "of the staff as the house surgeon. Whether he is called "specialist or consultant makes no difference. He, like all "the others, is just carrying out the duties of the Minister and "is entitled to the protection of section 21 of the Limitation "Act."

A specialist or consultant in carrying out his duties under a part-time appointment with a board is therefore not merely rendering services as a private though professionally skilled and qualified individual to a private citizen, but he is the instrument of the Minister to carry out part of the national scheme "to "provide for the establishment of a comprehensive health service "for England and Wales." I quote again the long title to the Act. It seems to me that he is thus carrying out necessarily a public function (see *McMillan* v. *Guest* [14]), and, in my judgment, such a specialist is properly described as the holder of a public office. So far I agree with the conclusion of the special commissioners and, indeed, go further in holding that the office is public. The commissioners, however, then decided that, though the appointment constituted the holding of an office, nevertheless the taxpayer was assessable to tax under Schedule D. Mr. Heyworth Talbot, for the taxpayer, has candidly conceded that he can find no argument to support this conclusion of law. It is, indeed, clear that in reaching that conclusion the commissioners have misunderstood the effect of *Davies* v. *Braithwaite* [15] and my own later decision in *Household* v. *Grimshaw*.[16] Those decisions, while helpful in reaching a conclusion as to whether there is, on the one hand, an office or employment, or on the other an exercise of a profession, have no bearing on the tax position once it is found that the activity in question is an office or employment.

Apart from Mr. Heyworth Talbot's point, which I shall mention in a moment, it is not in dispute that if a person holds an office of employment he must be assessed to tax under Schedule E in respect of his earnings arising therefrom; there is no option about it.

Mr. Talbot's point, however, is this: There is a finding in each case (as amended) to this effect (I take Dr. Ross's case for convenience): "We also find that at all material times Dr. Ross

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[14] [1942] A.C. 561.

[15] [1931] 2 K.B. 628.

[16] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

" exercised the profession of consultant radiologist, his part-time " hospital appointments being a necessary part of the exercise of " that profession by him and merely incidental thereto, notwith- " standing that a great deal of his time was thereby taken up. " We do not seek to describe the profession of consultant " radiologist in general."

That phraseology is not very happy, but I think the parties are agreed that it means this: that Dr. Ross, to establish himself as a specialist, found it necessary as a practical matter to take a hospital appointment; it was a necessary incident of his profession. No doubt this would be for a number of reasons: first and most important, it was the best way of practising and improving his particular skill; secondly, it would provide a salary on which to live; thirdly, it would bring him into contact with general practitioners who would, in due course, no doubt send him their private patients; fourthly, it is only by taking an appointment that hospital services could be made available to the specialist's private patients; there may well be other reasons.

Founding himself upon this Mr. Talbot submits that all Dr. Ross's expenses, whether incurred in the course of exercising his office under the National Health Service Act or otherwise, are all part of carrying on the profession of a consultant radiologist. Therefore, any expenses incurred in the course of exercising the office which would not be allowable under Schedule E but would be allowable under Schedule D, may be brought into account as part of the general exercise of his profession of a consultant radiologist.

Mr. Talbot poses the question, is Dr. Ross carrying on one profession or two? The question is a narrow one and without the slightest importance except for the purpose of income tax. In a general sense, of course, Dr. Ross is carrying on the profession of a radiologist whether he is performing his National Health functions or attending to private patients. It is all part of his vocation as a medical adviser. In my judgment, however, the argument ought not to succeed. When carrying out his National Health duties, Dr. Ross is performing the duties of an office and he is taxed under Schedule E. When attending private patients he is exercising his profession and is taxed under Schedule D. Each schedule and the rules thereunder contains, in the words of Lord Atkin in *Fry* v. *Salisbury House Estate Ltd.*,[17] " definite

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[17] [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266.

"codes applying exclusively to their respective defined subject-"matters."

Once the conclusion is reached that the National Health appointment is the holding and exercise of an office (and that is the vital decision), the expenses attendant thereon must be deducted under the rules applicable to Schedule E and, in my judgment, under no other schedule. The fact that the exercise of that office may truly be described as an incident of the profession of radiologist cannot alter that position. Mr. Talbot relied on the case of *Hughes* v. *Bank of New Zealand*.[18] The Bank of New Zealand had certain tax-exempt securities, exempt as to some by virtue of section 46 of the Income Tax Act, 1918, and as to others by virtue of the rules under Schedule C, which were purchased out of floating capital. It was held that the expenses of making those investments were allowable as a deduction in computing tax liability. That was decided unanimously in all courts. Lord Wright M.R. pointed out that there was only one indivisible trade, and the expenses in question were properly allowable as deductions in computing income tax liability. The exempting provisions exempted certain interest from tax, but there was nothing in those provisions which precluded the company from claiming the expenses as allowable deductions.

That seems to me a very different case, and does not lay down any principle which assists me in this case. This point fails.

I turn then to the supplementary questions. First, as to domiciliary visits. In addition to the performance of the ordinary duties the specialist may if, but only if, he so desires undertake domiciliary visits. That is, he undertakes at such times and within such area as he may prescribe in his contract to visit patients, whom a general practitioner does not desire to be treated in hospital, at their homes. Such visits are arranged directly between the general practitioner and the specialist concerned. The specialist takes his own apparatus to the patient's house, e.g., X-ray apparatus, examines him, develops the film, usually in hospital, and then reports to the general practitioner concerned. For this service he receives a fee of four guineas for each domiciliary visit (with a maximum of 200 visits in each year) and two guineas for the use of his apparatus, but once only per patient.

That a specialist holding a National Health appointment might as part of his duties carry out domiciliary visits is clearly contemplated in section 3 (1) (*c*) of the Act. It seems to me clear that in making those visits the specialist is exercising part of his duties under the Act; that is to say, the visits are all part of the exercise of the public office which he holds under the Act. In my judgment, it is no point of distinction that the specialist need not contract to make domiciliary visits, nor that the visits are arranged directly between the specialist and the general practitioner, nor that the specialist uses his own apparatus for which, incidentally, he is paid by the State. Accordingly, the expenses attendant thereon must be deducted under the rules applicable to Schedule E.

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[18] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.

Finally, I turn to the question of expenses attendant on the work of a locum tenens in respect of a National Health appointment. The phrase is so well understood in connection with the medical profession that I need not explain it. The case of Mr. Drew shows how informal are the arrangements made for this type of work. It was said that Dr. Tarnesby and Mr. Drew, in carrying out such work, were merely undertaking engagements in the same way that Miss Lilian Braithwaite did. I disagree. The phrase " locum tenens " is in fact a most apt and appropriate expression to describe the work. The specialist in doing such work is, in fact, holding the post of another. He is, for the time being, exercising the functions and holding the public office of another. How can his expenses of doing so properly be allowed on some different basis from that of its real holder of the office, in whose shoes he temporarily stands? In performing this work he is exercising a public office and his expenses must be deducted under the rules applicable to Schedule E.

Both Dr. Hirtenstein and Mr. Drew received fees and, no doubt, incurred expenses in lecturing, but it seemed to me that the facts relating to these activities were quite insufficiently explored before the special commissioners to enable me to decide whether such work was undertaken as part of the specialist's public office under the Act or as part of his general practice. Mr. Wilberforce did not press this point or ask me to send the cases back for further findings. Therefore I say nothing about this aspect of the matter; it was not argued before me and it must be left to some future case to resolve this problem. The decision of the commissioners that expenses in connection with lecturing are deductible under Schedule D will therefore stand for the relevant years of assessment.

Both Dr. Tarnesby and Mr. Drew undertook domiciliary work

1959

MITCHELL AND EDON v. ROSS. MITCHELL AND HADDOCK v. HIRTENSTEIN. MITCHELL AND MELLERSH v. MARSHALL. TAYLOR-GOOBY v. TARNESBY. TAYLOR-GOOBY AND JOB v. DREW.

not only in the area of the regional board with which they respectively had contracts but in other areas. Here again, the facts were insufficiently found, and Mr. Wilberforce asked me to deal only with the straight-forward case of Dr. Ross so far as the expenses of domiciliary visits are concerned. Therefore, again, I decide nothing about domiciliary visits to outside areas.

Accordingly, the decision of the commissioners that the expenses in connection with domiciliary visits to outside areas are deductible under Schedule D will stand for the relevant years of assessment.

Subject to that, I allow the appeal in each case. These five cases must be remitted to the special commissioners to assess each respondent under Schedule E in respect of his earnings arising from appointments under the Act.

Appeals allowed with costs.

Solicitors: *Solicitor of Inland Revenue; Hempsons.*

1959
May 11;
July 27.

Wynn-Parry J.

In re WALKDEN SHEET METAL CO. LTD.

[No. 00105 of 1959.]

Company—Winding up—Execution—Voluntary liquidation—Payment to bailiff to avoid sale—Payment more than 14 *days before receipt of notice of winding up—Payment over to sheriff within* 14 *days—Money claimed by liquidator—Whether "benefit of execution"—Whether money received in "part satisfaction of the execution"—Whether payment to bailiff payment to sheriff—Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 325 (1), 326 (1) (2).

On April 2, 1958, a creditor issued a writ of fi. fa. against a company. On April 21, 1958, the company paid £500 to the bailiff in respect of the company's indebtedness of £1,532 and undertook to pay off the balance by further instalments. No instalments were in fact paid, and on May 8, 1958, notices were received by creditors and shareholders for the purpose of a voluntary winding up of the company. On May 16, 1958, the company went into voluntary liquidation. On May 20, 1958, the liquidator wrote to the undersheriffs notifying them that the company was in liquidation and requesting them to hand over the balance of the £500 (a small debt having been paid by the bailiff). On May 27, 1958, the bailiff transmitted the balance to the under-sheriff. It was not disputed that the payment was made to avoid a sale. On a claim by the liquidator that he was entitled under sections 325 (1) or 326 (1) or (2) of the Companies Act, 1948,[1] to the balance remaining in the hands of the sheriff:—

Held, (1) that the money paid to the bailiff did not come within the charge created by the execution, since it was paid to prevent the charge operating, and it was not therefore within the phrase "the benefit of the execution" in section 325 (1).

(2) That the reference to money "received in part satisfaction "of the execution" in section 326 (1) was to money paid in the carrying out of the execution, and not to money paid (as here) to

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[1] Companies Act, 1948, s. 325: "(1) Where a creditor has issued execution against the goods or lands of "a company or has attached any debt "due to the company, and the company is subsequently wound up, he "shall not be entitled to retain the "benefit of the execution or attachment against the liquidator in the "winding up of the company unless "he has completed the execution or "attachment before the commencement "of the winding up: Provided that— "(*a*) where any creditor has had notice "of a meeting having been called "at which a resolution for voluntary "winding up is to be proposed, the "date on which the creditor so had "notice shall, for the purposes of the "foregoing provision, be substituted "for the date of the commencement "of the winding up; (*b*) a person who "purchases in good faith under a sale "by the sheriff any goods of a company on which an execution has "been levied shall in all cases acquire "a good title to them against the "liquidator; and (*c*) the rights conferred by this subsection on the "liquidator may be set aside by the "court in favour of the creditor to "such extent and subject to such "terms as the court may think fit."

S. 326: "(1) Subject to the provisions of subsection (3) of this "section, where any goods of a company are taken in execution, and, "before the sale thereof or the completion of the execution by the "receipt or recovery of the full amount "of the levy, notice is served on the "sheriff that a provisional liquidator "has been appointed or that a winding-up order has been made or that "a resolution for a voluntary winding "up has been passed, the sheriff shall, "on being so required, deliver the "goods and any money seized or "received in part satisfaction of the "execution to the liquidator, but the "costs of the execution shall be a first "charge on the goods or money so "delivered, and the liquidator may "sell the goods, or a sufficient part "thereof, for the purpose of satisfying "that charge. (2) Subject to the "provisions of subsection (3) of this "section, where under an execution "in respect of a judgment for a sum "exceeding twenty pounds the goods "of a company are sold or money "is paid in order to avoid sale, the "sheriff shall deduct the costs of the "execution from the proceeds of the "sale or the money paid and retain "the balance for 14 days, and if within that time notice is served on him "of a petition for the winding up of "the company having been presented "or of a meeting having been called "at which there is to be proposed a "resolution for the voluntary winding "up of the company and an order is "made or resolution is passed, as the "case may be, for the winding up of "the company, the sheriff shall pay "the balance to the liquidator, who "shall be entitled to retain it as "against the execution creditor."

avoid sale which was paid not in carrying out the execution but to prevent or halt it.

(3) That the matter was governed by section 326 (2), which dealt expressly with money paid to avoid sale, and the payment to the bailiff on behalf of the creditor was payment received on behalf of the sheriff within the meaning of that subsection; that the period of 14 days during which the sheriff was bound to retain the money began to run on April 21, when the money was received by the bailiff, and not on May 27, when it was received by the sheriff, it had therefore expired before the winding-up notices were received; and that, therefore, the liquidator's claim under subsection (2) of section 326 also failed.

ADJOURNED SUMMONS.

The liquidator in the creditors' voluntary winding up of Walkden Sheet Metal Co. Ltd. asked for a declaration that he, as liquidator of the company, was "entitled to the net sum of "£448 16s. being the balance of the sum of £500 recovered from "the said Walkden Sheet Metal Co. Ltd. on or about April 21, "1958, at the suit of . . . Douglas Elliott & Co. Ltd. and now "held by the Sheriff for the County of Lancaster."

The following statement of facts is taken substantially from the judgment: On April 2, 1958, Douglas Elliott & Co. Ltd. (hereafter referred to as "the creditor") issued a writ of fi. fa. against the company. In the middle of April an arrangement was come to with the aid of one Bowling, who was the bailiff or man in possession [and described himself as "officer to the Sheriff of Lancashire"], under which on April 21, 1958, £500 was paid by the company to him (in respect of the company's total indebtedness of £1,532), and the company undertook to pay off the balance by instalments of £70 per week, none of which in fact it was able to pay. Under cover of a letter dated May 7, 1958, the necessary notices convening meetings of creditors and shareholders for the purpose of placing the company in a creditors' winding up were sent out, being received on May 8, 1958. On May 16, 1958, the company went into voluntary liquidation and the present liquidator was appointed.

By letter dated May 20, 1958, the liquidator wrote to the under-sheriffs notifying them that the company was in liquidation and enclosing a copy of the relevant resolution. He also requested them to hand over the balance in their hands of the £500 paid by the company to Bowling. On May 27, 1958, Bowling transmitted £463 9s. 4d. to the under-sheriffs, being the balance of the £500 less a debt which he had paid and his costs. The under-sheriffs now held a net sum of £448 16s. 10d. in their hands and it was the destination of this sum which was in dispute.

John Brookes for the liquidator. The liquidator claims the balance of the £500 now in the hands of the sheriff under sections 325 (1), 326 (1) and (2) of the Companies Act, 1948. It is not in dispute that this was money paid in order to avoid a sale, and this particular question—namely, whether money so paid on behalf of a company can be claimed by the liquidator when the money remains in the hands of the sheriff or a subordinate of his at the commencement of the winding up of the company—has not arisen before. The execution has not been completed (see section 325 (2)); and the submission under section 325 (1) is that the right of the execution creditor to claim the money from the sheriff is part of "the benefit of the execution" within the meaning of that subsection. It is well settled that those words refer not to "the fruits of the execution" previously received by the creditor, but to the charge conferred on the creditor as a result of the issue of the execution: *In re Andrew, Ex parte Official Receiver* (*Trustee*),[2] *In re T. H. Godwin, Ex parte The Trustee* v. *Morris*[3] and *In re Samuels, Ex parte The Trustee* v. *J. H. S. Tee, Trading as Tee Bros. & Co.*[4]

Had the money been paid away to the execution creditor by the sheriff's officer, the liquidator would have had no claim; but it is clearly established by *Bluston & Bramley Ltd.* v. *Leigh*[5] that the creditor's right to claim the money in the hands of the sheriff was divested by section 325 (1) at the commencement of the winding up (the operative date here being May 8, 1958), and the sheriff must account to the liquidator for it. No difference for this purpose arises from the fact that the money was paid to avoid sale and was not the proceeds of sale: *In re Andrew.*[6]

As to the claim under section 326 (1), this case falls exactly within the words of the subsection. In particular the money paid was "money . . . received in part satisfaction of the execution." It was clearly received by Bowling on account of the money owing to the execution creditor, and in respect of which the execution issued; it must therefore fall within the subsection. Receipt or recovery of the full amount of the levy is expressed to constitute completion of the execution; receipt or recovery of a partial amount must constitute part satisfaction.

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[2] [1937] Ch. 122; 53 T.L.R. 90.

[3] [1935] Ch. 213; 51 T.L.R. 118.

[4] [1935] Ch. 341; 51 T.L.R. 169.

[5] [1950] 2 K.B. 548; 66 T.L.R. (Pt. 2) 103; [1950] 2 All E.R. 29.

[6] [1937] Ch. 122, 136.

Finally, the liquidator can claim the money under section 326 (2) as money "paid in order to avoid sale," because the condition in the subsection that the money must be retained by the sheriff for 14 days without receipt of a winding-up notice has not been satisfied. The statutory period did not begin to run until May 27, 1958, when the money was paid over to the under-sheriffs. Until then it was held by Bowling, the man in possession, and possession of the money by him was not possession by the sheriff within the meaning of section 326 (2) and (4), and the statutory period could not run: *Ex parte Warren, In re Holland* [7]; *Bellyse* v. *M'Ginn.*[8] The period laid down in the subsection had therefore not elapsed when notice was received on May 8, 1958, of a meeting having been called for the purpose of passing a resolution for voluntary winding up, and the execution creditor's title is superseded by the liquidator's.

This case falls within all the three subsections and the liquidator is entitled to claim the money under any of them.

Owen Stable for the creditor. This money falls to be dealt with under section 326 (2) of the Act; sections 325 (1) and 326 (1) have no application here at all.

With regard to section 326 (2), when payment was made to Bowling (the sheriff's man in possession) on April 21, he would, but for that subsection, have had no right to retain the money contrary to the wishes of the execution creditor, but because of that subsection he was bound to hold the money for 14 days, whatever the wishes of the execution creditor, to see whether the sheriff received any notice of a winding up. If the sheriff received no such notice, Bowling had no right, save as to deduction of the sheriff's costs, to hold the money beyond the 14 days. The liquidator claims that payment to Bowling was not payment to the sheriff. The creditor claims that Bowling must have received the money on behalf of the sheriff, and that the position is not affected by the fact that Bowling does not come within the statutory definition of "sheriff." Bowling cannot have received the money in any other way, unless as agent for the debtor, of which there is no evidence. Both cases cited, *Ex parte Warren* [9] and *Bellyse* v. *M'Ginn,*[10] are limited to the question of notice; they decide that notice served on the man in possession does not discharge a statutory obligation to serve notice on the sheriff; it would be astonishing if, where a statute provided that notice should be served on the sheriff, it could be served on the man in possession. Those two cases do not touch the question here. When the sheriff told his man to collect the money on his behalf, and his man did so, it would lead to the most appalling results if such payment was to be treated in any way other than payment to the sheriff. The court is asked to hold that Bowling received this money on behalf of the sheriff and that the statutory period began to run on April 21, 1958, when the money was paid to him, and that, accordingly, the statutory 14 days had elapsed when the notice was received on May 8, 1958.

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[7] (1885) 15 Q.B.D. 48.

[8] [1891] 2 Q.B. 227.

[9] 15 Q.B.D. 48.

[10] [1891] 2 Q.B. 227.

Section 325 (1) cannot apply to the present circumstances. It deals with a benefit of execution. Money paid, as here, to avoid a sale is not a benefit of the execution. *In re Andrew*,[11] *In re Godwin*[12] and *In re Samuels*[13] are all in favour of this submission. There is a vital difference between *Bluston & Bramley Ltd.* v. *Leigh*[14] and this case, because in that case there was a sale, and in the present case the payment was in order to avoid a sale. That is an important distinction, because proceeds of a sale are a benefit of the execution and a payment to avoid a sale is not: *In re Andrew*.[15] It is indicated in the argument there that goods seized on behalf of a person's debt are charged with that person's debt. When the goods are sold and converted into money, the charge subsists but only up to the completion of the execution. After that it is too late for a liquidator to claim it and the execution creditor is entitled to it. For the same reasons section 326 (1) does not apply. This subsection relates to the position of a notice being received after seizure and before a sale, which was not the position here. In *In re Pearson, Ex parte Cannock Colliery Co.*[16] money paid in circumstances similar to those of the present case was held by the Court of Appeal to belong to the joint creditors immediately the payment was made: *per* Pollock B. It was because of that decision that a provision relating to a payment to avoid a sale was incorporated into the Bankruptcy Act, 1883, which is the earliest statute in which one finds the requirement of 14 days.

Brookes in reply. It is not sufficient that the money should be held by the man in possession to comply with the condition in section 326 (2). It seems to be said that the cases cited did not relate to this provision. In fact they related to provisions of the Bankruptcy Acts of 1883 and 1890, which are in exactly similar terms. The condition imposed by the statute means that the sheriff must retain the money in his banking account: here it was in Bowling's banking account. The sheriff who is to retain must be the same as the "sheriff" upon whom notice is to be served.

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[11] [1937] Ch. 122.

[12] [1935] Ch. 213.

[13] [1935] Ch. 341.

[14] [1950] 2 K.B. 548.

[15] [1937] Ch. 122.

[16] (1886) 3 Morr. 187, 191.

The right of the creditor was a vested right, liable to be divested in certain circumstances. It was in the circumstances divested under all three subsections. *In re Andrew*[17] laid it down that there was no distinction between moneys paid to avoid sale and moneys paid as a result of a sale; section 325 (1), therefore, does apply to this case.

Cur. adv. vult.

July 27. The following judgment of WYNN-PARRY J. was read by Vaisey J., in which he stated the facts as set out above, and continued: Mr. Brookes, for the liquidator, contends that the liquidator is entitled as against the creditor to the balance in the hands of the under-sheriffs under section 325 (1) or section 326 (1) or section 326 (2) of the Companies Act, 1948. It is agreed that the £500 paid by the company to Bowling is properly to be regarded as "money paid to avoid sale." This is a phrase which appears in section 326 (2) and, at any rate at first sight, it would be surprising if such moneys, which are dealt with expressly in section 326 (2), were found to be dealt with also in section 325 (1) and section 326 (1).

[His Lordship read section 325 (1) (*a*), (*b*) and (*c*) of the Companies Act, 1948, so far as material, and continued:] This case, so far as a consideration of section 325 (1) is required, appears to me to raise a new point. It is established that the phrase "the benefit of the execution" does not refer to "the "fruits of the execution" but to the charge which is conferred on the creditor as a result of the issue of execution: *In re Andrew, Ex parte Official Receiver (Trustee)*,[1] approving and applying *In re T. H. Godwin, Ex parte The Trustee* v. *Morris*,[2] and *In re Samuels, Ex parte The Trustee* v. *J. H. S. Tee, Trading as Tee Bros. & Co.*[3] It is further clear that any money received by the sheriff or his officer and actually paid over to the creditor is outside the charge. The question, which, up to now, does not appear to have arisen for judicial decision, is what is the position of money paid to the sheriff or his officers in order to avoid sale, where that money still remains in the hands of the sheriff or his officer at the commencement of the winding up? In my judgment, the correct view is that money so paid does not come within the charge created by the issue of execution: it is outside it: it is paid to prevent the charge operating, at any rate pro tanto, on the property of the debtor: and therefore it is not included within the phrase "the benefit of the execution" in section 325 (1). I therefore conclude that section 325 (1) has no application to the present case.

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[17] [1937] Ch. 122.

[1] [1937] Ch. 122; 53 T.L.R. 90.

[2] [1935] Ch. 213; 51 T.L.R. 118.

[3] [1935] Ch. 341; 51 T.L.R. 169.

I now turn to section 326 (1). [His Lordship read section 326 (1) of the Act.] That subsection appears to me to be dealing entirely with execution properly so-called. The vital words are "before the sale thereof or the completion of the execution." This phrase is followed by the words "by the receipt or recovery "of the full amount of the levy," but later reference is made to "any money seized or received in part satisfaction of the "execution." In my view, money paid in order to avoid sale is not money paid in or towards satisfaction of the execution, but money paid to prevent or halt the execution, and therefore, when the section refers to money received, it is not talking of money received to avoid sale but of money received in the carrying out of the execution. Execution is a process designed to carry into effect the charge to which I have referred in discussing section 325 (1). No case was cited which deals directly with this point, but, on the true construction of the wording of section 326 (1), I take the view that moneys paid in order to avoid sale do not fall within its purview.

There remains section 326 (2), which deals expressly with money paid to avoid sale, and which, in my view, is the statutory provision which governs this case. [His Lordship read section 326 (2) of the Act.]

As it is agreed that the £500 is to be regarded as money paid to avoid sale, the sole question which arises under this subsection is as to when the period of 14 days began. For the liquidator it was contended that the period began on May 27, 1958, when Bowling transmitted the balance of money in his hands to the under-sheriffs. If that contention be correct, then the statutory period of 14 days had not elapsed by the time the notices of meetings for voluntary liquidation were received on May 8, 1958. On the other hand, it is contended on behalf of the creditor that the period of 14 days started on April 21, 1958,

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when the £500 was paid by the company to Bowling: in which case the period of 14 days had expired before May 8, 1958.

The argument on behalf of the liquidator is based on the contention that the statutory period does not begin to run until the money is in the hands of the sheriff or the under-sheriff, and that it cannot be said to have been in his hands within the provisions of the subsection until May 27, 1958, because prior thereto it was in the hands of Bowling, who is not a person falling within the definition of "sheriff" in section 326 (4): see *Ex parte Warren, In re Holland*[4] and *Bellyse* v. *M'Ginn.*[5] I agree with this argument to the extent that Bowling is not within the definition. But, to my mind, that does not conclude the matter. In my view, the proper way in which to approach this question is to consider the position of Bowling and his relationship to the sheriff. Bowling is described on his notepaper, and in my view correctly described, as "Officer to the Sheriff "of Lancashire." Therefore, although he does not fall within the definition of "sheriff" in section 326 (4), he is one who is employed by and is responsible to the sheriff: and his powers and rights cannot be greater than those of the sheriff. It follows, in my view, that even though he makes, as he did in this case, an arrangement to receive money on behalf of the creditor, as that money was paid by the company in order to avoid sale, he must be regarded as receiving money for the purposes of section 326 (2) on behalf, in the first instance, of the sheriff. If that is right, then just as the sheriff would be bound, so he, on behalf of the sheriff, would be bound to retain the money for the statutory period of 14 days. But, on that reasoning, it must follow that the statutory period of 14 days started on April 21, 1958. On that basis the period had expired before receipt by the under-sheriffs of the notices of the meetings on May 8, 1958.

I think that support for this view is to be found in the language of the subsection. The material words are "Where . . . "money is paid in order to avoid sale . . . the sheriff shall retain "the balance for fourteen days." The force of that language is that the 14 days runs from payment. There is no room for the interposition of a hiatus during which the money is held by someone other than the sheriff (as defined in section 326 (4)). Thus it seems to me that the only sensible construction to place on the subsection is to say that once the debtor pays to an officer of the sheriff a sum of money in order to avoid sale, time begins to run in favour of the creditor. Any other interpretation must result in unfairness to the creditor. The policy of the legislature is that, after payment, only a limited period is to elapse before the creditor is to have the benefit of the payment. It cannot be right that where, through events quite beyond the control of the creditor, the money is not paid by the officer of the sheriff to the sheriff for some time—with the result that the sheriff does not actually handle the money until a date within 14 days of receiving the notices of meetings for liquidation—the period should be treated as starting from the date of actual receipt by the sheriff and the creditor thus be deprived of the right to receive the money.

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[4] (1885) 15 Q.B.D. 48.

[5] [1891] 2 Q.B. 227.

For these reasons, in my view, this summons must be dismissed with the usual order as to costs: namely, that the liquidator will pay the taxed costs of the creditor, and be entitled to retain those costs and his own costs of the summons out of the assets of the company in the course of the liquidation.

Summons dismissed; costs of both parties to be paid by the liquidator out of the assets of the company.

Solicitors: *Menassé & Tobin for Whittingham, Glass & Morrison, Manchester; Ward, Bowie & Co. for Booth & Co., Leeds.*

I. G. R. M.

In re COHEN, DECD.
NATIONAL PROVINCIAL BANK LTD. *v.* KATZ AND OTHERS.

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Oct. 13, 14.
Danckwerts J.

[1950 C. 3865.]

Administration of Estates—Payment of debts—Property liable—Mortgaged property—Part specifically devised and part falling into residue—Whether specifically devised realty exonerated from debt—" Whether . . . deceased . . . by will . . . signified a contrary " . . . intention " — Executor's sale of properties to discharge testator's liabilities—Whether debts defrayed out of sale to be borne by all beneficiaries—Sale of property at more than probate value—Whether contribution and abatement on basis of probate value or of amount realised on sale—Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *s.* 35 (1).

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COHEN, DECD., *In re.* NATIONAL PROVINCIAL BANK LTD. *v.* KATZ.

Judicial Precedent—Decision at first instance—Whether binding on other judge—Question affecting rights of property—Prior decision doubted in dissenting judgment in Court of Appeal.

Equity—Equality—Beneficiaries under will—Sale of some bequests to pay testator's debts.

A testator, having appointed a bank and his wife executors and trustees, devised to them a freehold property, a house, on trust for one of his daughters absolutely, another on trust for his other daughter absolutely, and his residuary estate on trust for his wife for her own absolute use and benefit. At his death both those houses, together with four out of six houses forming part of his residuary estate, were mortgaged to the bank to secure an overdraft. After the testator's death his wife, the testatrix, by her will appointed the bank her trustee and made a number of specific devises including, inter alia, the six houses forming part of the testator's residuary estate, to the two daughters and their children. After her death the bank, on the footing that section 35 of the Administration of Estates Act, 1925,[1] applied, apportioned the debts comprised in the testator's overdraft equally among the mortgaged properties according to their respective values; it had, however, to have recourse to some of the six freehold properties comprised in his residuary estate, and sold four of them, two for more than their probate value at his death. Subsequently, the bank sold another of the houses, also for more than the probate value, for the benefit of the devisee under the testatrix's will, and, later, to pay the debts of the testatrix, it sold the sixth house.

On a summons to determine whether, inter alia, all six of the properties comprised in the testator's residuary estate should have contributed rateably to satisfy his liabilities and whether the specific devises and bequests made by the testatrix should abate according to the amount at which they had been valued for probate or the amount for which they were sold:—

Held, (1) that, as the testator had given the two houses to his daughters by specific bequest as opposed to residuary devise, he had ". . . by will . . . signified a contrary . . . intention . . ." within section 35 of the Administration of Estates Act, 1925, sufficient to exclude the provisions of that section, and that, therefore, those two houses were not liable to bear proportionate parts of the mortgage debt which ought to have been discharged out of the testator's residuary estate.

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[1] Administration of Estates Act, 1925, s. 35 (1): "Where a person "dies possessed of . . . an interest "in property, which at the time of "his death is charged with the payment of money, whether by way of "legal mortgage, equitable charge or "otherwise . . . and the deceased "has not by will deed or other "document signified a contrary or "other intention, the interest so "charged shall, as between the "different persons claiming through "the deceased, be primarily liable "for the payment of the charge; and "every part of the said interest, "according to its value, shall bear a "proportionate part of the charge on "the whole thereof."

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In re Biss [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89 followed.

In re Cole [1958] Ch. 877; [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102 and *In re Smith* (1886) 33 Ch.D. 195 considered.

(2) That the bank as executor was entitled to sell any of the six properties which the testatrix had purported to devise of which the proceeds of sale were required to pay the testator's debts, but that the beneficiaries under her will did not lose all right to the proceeds of sale, and that, on the principle that equity will attempt to do justice among all beneficiaries on an equal footing, the burden of the debts which were paid out of the proceeds of sale of some only of the properties ought to be borne equally and rateably among all the beneficiaries, whose benefits should likewise abate rateably for the purposes of claiming under the testatrix's estate.

Sudeley v. *Attorney-General* [1897] A.C. 11; 13 T.L.R. 38; *Tombs* v. *Roch* (1846) 2 Coll. 490; and *Aldrich* v. *Cooper* (1803) 8 Ves. 382 considered.

(3) That for purposes of paying the testator's and the testatrix's debts the contribution of the specific devisees must be on the basis of the probate values of the properties; and that the specific devises must, likewise, abate on the basis of the probate values.

Fielding v. *Preston* (1857) 1 De G. & J. 438 and *In re John* [1933] Ch. 370 followed.

ADJOURNED SUMMONS.

A testator, Max Cohen, by his will dated June 21, 1944, provided, inter alia: " . . . I appoint National Provincial Bank Ltd. " . . . and my wife Rebecca Cohen . . . to be executors and " trustees of this my will and to be trustees hereof for all the " purposes of the Settled Land Act, 1925 . . . I give devise " and bequeath to my said wife the business of a costumier as " now carried on by me at 55 Dalston Lane London and at any " other address at which the said business may be carried on for " the time being and I declare that this gift shall include all " goods manufactured and unmanufactured and all stock in trade " belonging to me in connection with or used for the purposes of " my said business and the benefit of all contracts subsisting in " relation thereto at my death and also all book debts which shall " then be owing to me in connection with the said business and " all money at the Bank to the credit of my business account at " the National Provincial Bank Aldersgate and my said wife shall " take over and discharge all my liabilities in connection with " my said business existing at my death and shall indemnify my " estate against the same . . .

" I bequeath to my daughters Lily Rosen the wife of Dr. " Joseph Rosen 37 Warwick Square Clapton London and Edith

"Katz the wife of Karl Kodish Katz the sum of one thousand "pounds each free of legacy duty and I direct that such legacies "and duty thereon shall be paid to them out of my said business "in exoneration of my residuary estate and be contingent on my "said business still being in existence at the date of my death "and contingent also upon there being sufficient funds in the "said business to discharge the legacies and duty thereon . . .

"I devise my freehold property known as No. 10 Cavendish "Place Brighton in the County of Sussex unto my trustees upon "trust for my said daughter Edith Katz free of duty absolutely " . . .

"I devise my freehold property known as No. 7 Cavendish "Place Brighton in the County of Sussex unto my trustees upon "trust for my said daughter Lily Rosen free of duty absolutely " . . .

"And as to all the rest residue and remainder of my estate " . . . I give devise and bequeath the same unto my trustees upon "trust to sell call in and convert into money such part thereof "as shall not consist of money with power in their absolute discretion to postpone such sale calling in and conversion . . . and "to pay and transfer the same both as to capital and income to "my said wife for her absolute use and benefit . . ."

On April 30, 1948, the testator died. At that date Number 7 and Number 10 Cavendish Place, and also 3 Cavendish Place, 37 Hampton Place, Brighton, 41 Brunswick Terrace, Hove, and 61 Holders Hill Avenue, Hendon, all four of which were part of the testator's residuary estate, were mortgaged to the National Provincial Bank to secure the testator's overdraft, then amounting to £3,159 7s. 1d. Also in his residuary estate were 252 Kingsland Road, London, and 198 Portland Road, Hove.

By her will dated August 3, 1948, his widow, Rebecca Cohen, the testatrix, provided, inter alia: " . . . 1. I appoint National "Provincial Bank Ltd. (hereinafter called 'the Bank') to be executors and trustees of this my will and to be trustees hereof for "all the purposes of the Settled Land Act, 1925 . . . 3. I give "devise and bequeath the following freehold properties (free of "all death duties) to the following persons absolutely namely:— "(a) To my daughter the said Lily Rosen the properties known "as Number 3 Cavendish Place Brighton aforesaid and Number 5 "Brunswick Square Hove . . . (b) To my grandson Maurice "Rosen the property known as 252 Kingsland Road, London, "E.2 . . . (c) To my grandson Stanley Cohen the property "known as Number 14 Rectory Road, London, N.16 . . . (d) To "my daughter the said Edith Katz the properties known as "Number 41 Brunswick Terrace Hove aforesaid and Number 197 "[sic] Portland Road Hove aforesaid (e) To my daughters the "said Lily Rosen and Edith Katz the factory and premises known "as Number 14a Rectory Road London N.16 (and all stock and "contents therein) in equal shares as tenants in common . . . "(f) To my grandson Lionel Katz the property known as Number "19 Montpelier Villas aforesaid . . . (g) To my daughter the "said Lily Rosen the property known as Number 61 Holders Hill "Avenue Hendon (h) To my granddaughter Pamela Katz the "property known as Number 37 Hampton Place Brighton . . . "4. I give and bequeath to Kodish Katz and his son the said "Lionel Katz in equal shares and interest in [sic] the goodwill "plant machinery fixtures and fittings and any other fixed assets "and stock in the business carried on at 14a Rectory Road aforesaid . . . with the direction that they shall rent the factory at "the said premises from my two daughters the said Lily Rosen "and the said Edith Katz at a rental of £24 weekly . . . 5. I "give devise and bequeath all the rest residue and remainder of "my estate . . . unto my said daughters Lily Rosen and Edith "Katz in equal shares or to the survivor of them . . ."

The testatrix died on August 18, 1948. The National Provincial Bank took the view that section 35 of the Administration of Estates Act, 1925, applied to the testator's overdraft, and apportioned that debt rateably among the various mortgaged properties in accordance with their respective values. The bank had, however, to have recourse to some of the six freehold properties specifically devised by the testatrix to discharge his liabilities, and in 1953 sold 3 Cavendish Place, 198 Portland Road, 41 Brunswick Terrace and 61 Holders Hill Avenue, the two last mentioned for sums greater than the amount of their probate value at the date of the testator's death; in 1954 they sold, for Maurice Rosen's benefit, 252 Kingsland Road, also for a sum greater than the amount of that value, and in 1956, to pay the testatrix's debts, 37 Hampton Place. The bank treated the testatrix's specific devises of 3 Cavendish Place, 198 Portland Road, 41 Brunswick Terrace and 61 Holders Hill Avenue as having wholly failed and those of 252 Kingsland Road and 37 Hampton Place as having taken effect.

Proceedings with regard to both estates were before the courts over a long period and, inter alia, the bank's action in resorting to only four out of the six properties to satisfy the testator's liabilities was challenged on behalf of Lily Rosen, the contention being that all six ought to have contributed rateably to satisfy those liabilities, either to the amounts at which they were respectively valued for probate or to those for which they were respectively sold.

On March 26, 1957, the bank took out a summons, to which the defendants were Kodish Katz, Lionel Katz, Lily Rosen, Edith Katz, Stanley Cohen, Maurice Rosen, Pamela Katz and Harry Cohen, son of the testator and testatrix, asking, inter alia: 2. Whether on the true construction of the testator's will the properties thereby respectively specifically devised to Lily Rosen and Edith Katz were liable to bear proportionate parts of the moneys owing by the testator at the date of his death under five mortgages made between the testator and the bank or whether those moneys ought to have been discharged wholly out of the testator's residuary estate: 5. Whether the bank, as executor and trustee of the testator's will, was entitled at its discretion to sell all or any of 3 Cavendish Place, 252 Kingsland Road, 41 Brunswick Terrace, 198 Portland Road, 61 Holders Hill Avenue and 37 Hampton Place to discharge the liabilities of the testator's estate or whether those liabilities ought to be treated as charged on those respective properties rateably (a) in proportion to the sums at which they were respectively valued to obtain a grant of probate of the testator's will, or (b) in proportion to the sums for which they were respectively sold, or (c) in some other and what proportions: 6. Whether for the purposes of abatement the respective values of the properties respectively specifically devised or bequeathed by the testatrix's will ought to be ascertained by reference to (a) the amounts at which they were respectively valued to obtain a grant of probate of her will, or (b) the amounts for which they were respectively sold, or how otherwise those respective values ought to be ascertained.

Question 1 in the summons dealt with legacies given to Lily Rosen and Edith Katz, and did not call for report; question 3, which dealt with the rental of £24 weekly mentioned in clause 4 of the testatrix's will, and question 4, which asked that the bank be directed to refrain until further order from taking steps to recover from Kodish and Lionel Katz moneys owing by them to the testatrix's estate, were dealt with after judgment had been given on questions 5 and 6.

After the decision on question 1, argument was addressed to the court on question 2.

Michael Albery Q.C. and *B. S. Tatham* for the bank.

R. O. Wilberforce Q.C. and *Alan Campbell* for Lily Rosen. The bank acted incorrectly in apportioning the overdraft rateably among all the mortgaged properties and should have omitted those of Lily Rosen and Edith Katz. The court should here follow *In re Biss*,[2] in which Harman J. held that where part of property had been specifically devised and part fell into residue the specific devise was sufficient indication of an intention to take the property specifically devised out of section 35. It is difficult to imagine a case nearer to the present case.

Michael Browne for Stanley Cohen. The bank's view produces the most just result, namely, that all the mortgaged properties should join in wiping out the overdraft. The very fact of their being mortgaged to secure it shows that that was what the testator intended, and the specific devise of the two houses to the two daughters ought not to be construed as a "contrary intention" taking those properties out of the operation of section 35, especially since Harman J.'s decision was doubted by Lord Evershed M.R. in *In re Cole.*[3] It is irrelevant that the bank did not sell the remaining two houses in the residuary estate. *In re Smith*[4] is quite contrary to Harman J.'s decision and does not appear to have been brought to his attention at all. There the headnote states: "A testator, after directing payment of his "debts, devised a freehold house to his wife 'absolutely, to do "'with as she thinks proper'; and he directed his executors to "sell and convert into money whatever freehold or other property "he possessed and to collect all debts due to him and to apply "the proceeds in the payment of certain legacies. The testator's "real estate was all subject to one mortgage. *Held*, that the "will did not show any 'contrary or other intention' within "the meaning of Locke King's Act, and that consequently the "widow took the house subject to its rateable proportion of the "mortgage debt. *Brownson* v. *Lawrence*[5] dissented from: "*Sackville* v. *Smyth*[6] and *Gibbins* v. *Eyden*[7] followed." On those authorities the court is entitled, and is invited, not to follow Harman J.'s decision.

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[2] [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89.

[3] [1958] Ch. 877; [1958] 3 W.L.R. 447, [1958] 3 All E.R. 102.

[4] (1886) 33 Ch.D. 195.

[5] (1868) L.R. 6 Eq. 1.

[6] (1873) L.R. 17 Eq. 153.

[7] (1869) L.R. 7 Eq. 371.

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James Mitchell for Maurice Rosen, an infant, adopted the argument on behalf of Lily Rosen, the infant's mother.

The defendants Kodish Katz, Edith Katz, Lionel Katz, Pamela Katz and Harry Cohen were not represented.

DANCKWERTS J. I have now to decide a question which arises in connection with section 35 of the Administration of Estates Act, 1925, which, shortly, says that where a mortgage is charged on property or properties, those properties should bear the burden of the mortgage unless a contrary intention is shown in the will.

In the present case the mortgages to the bank were charged not only on the two properties specifically devised to Mrs. Katz and Mrs. Rosen, but also on other properties which formed part of the residue. The question is whether the properties specifically devised to Mrs. Lily Rosen and Mrs. Edith Katz are liable to bear proportionate parts of the mortgages, or whether they should be discharged out of the residuary estate of the testator.

This matter is subject to an express decision in extremely similar circumstances by Harman J. in *In re Biss*,* in which he held that the circumstances were sufficient to show a contrary intention. On the other hand, Harman J.'s decision has been doubted, although not overruled, in a dissenting judgment of Lord Evershed M.R. in *In re Cole*.† It appears that probably all the relevant authorities were not cited to Harman J., particularly *In re Smith*,‡ but it seems to me that, in the circumstances, I am bound to apply the decision of Harman J. to the present case and to decide, in fact, that the two houses were given to the two ladies by specific bequest as opposed to a residuary devise, and that that is sufficient evidence of a contrary intention to take the case out of section 35 of the Administration of Estates Act, 1925; if this produces any other result the matter must be dealt with by the Court of Appeal.

Argument was then addressed to the court on question 5.

Michael Albery Q.C. and *B. S. Tatham* for the bank.

R. O. Wilberforce Q.C. and *Alan Campbell* for Lily Rosen. In *Tombs* v. *Roch*[1] Knight-Bruce V.-C. held that the specific legatees and devisees had to contribute rateably the amount needed to pay the specialty debts, and he said further that the question was one of " . . . contribution, which, if it differs from " marshalling, does so in species rather than generically, in form " rather than in nature . . ." and he referred to *Aldrich* v. *Cooper*[2] in support of what he said. See also Halsbury's Laws of England, 3rd ed., vol. 14, p. 611, note (*g*), which sets out what Lord Eldon said in *Aldrich* v. *Cooper*,[2] and Story's Equity Jurisprudence, s. 558.

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* [1956] Ch. 243; [1956] 2 W.L.R. 94; [1956] 1 All E.R. 89.

† [1958] Ch. 877; [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102.

‡ (1886) 33 Ch.D. 195.

[1] (1846) 2 Coll. 490.

In the present case the testatrix purported to devise properties to which, strictly, she was not entitled: cf. the judgment of Lord Halsbury L.C. in *Sudeley* v. *Attorney-General*.[3]

Even were the bank entitled to sell all or any of the six properties, it is not right that, as a result of what has been done, some of the beneficiaries under the testatrix's will should get nothing. The proper course is to direct that all the beneficiaries should contribute rateably towards the discharge of the debts which were taken out of some only of the properties. Similarly they must each make sacrifices and their benefits under the testatrix's will must abate in the same way.

Michael Browne for Stanley Cohen. The authorities on the doing of justice among all the beneficiaries cannot soundly be contested: 14a Rectory Road must bear its share of the burden, but the bank got that share wrong.

James Mitchell, for Maurice Rosen, adopted the argument on behalf of Lily Rosen.

DANCKWERTS J. This question ought really to be divided into two. The question is: " Whether the plaintiffs as executors and " trustees of the said will of the testator were entitled at their " discretion to sell all or any of the following properties," and then are set out six properties which formed part of the residuary estate of the testator, Max Cohen: " (. . . each of which was " specifically devised by the said will of the testator) for the " purpose of discharging the liabilities of the estate of the " testator . . ."

It appears from an affidavit sworn on behalf of the plaintiff bank that, by reason of the insufficiency of the other assets, it became necessary to dispose of the debts by selling some of these properties, and, accordingly, the bank sold No. 3 Cavendish Place, Brighton, No. 41 Brunswick Terrace, Hove, No. 198 Portland

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[2] (1803) 8 Ves. 382.

[3] [1897] A.C. 11, 15; 13 T.L.R. 38.

Road, Hove, and No. 61 Holders Hill Avenue, Hendon, in 1953, and the proceeds of sale were used to pay the debts of the testator. All six of the properties had been specifically bequeathed by the will of Mrs. Rebecca Cohen to various beneficiaries. No. 3 Cavendish Place, Brighton, and No. 61 Holders Hill Avenue, Hendon, were devised to Lily Rosen; No. 252 Kingsland Road, London, to Maurice Rosen; No. 41 Brunswick Terrace, Hove, and No. 198 Portland Road, Hove, to Edith Katz; and No. 37 Hampton Place, Brighton, to Pamela Katz.

I have read the first half of the question, and it seems to me there is no doubt whatever that the executors were entitled, in the course of administration, to sell any of those properties the proceeds of sale of which were required for the payment of the testator's debts, but there is another, and, it seems to me, quite distinct, question: The properties having been sold in this way, do the beneficiaries under Rebecca's will lose all right to receive anything from the proceeds of sale, or does some equitable right arise? The bank seem to have taken the view that they lost all their rights, and the question is whether that was a correct view.

The second half of the question is: ". . . or whether such "liabilities ought to be treated as charged upon such respective "properties rateably . . . ," and then there is a question of value which remains to be considered later.

It would obviously be very hard on the persons whose properties were given to them by the will of Rebecca if the effect of some of the properties being sold by the executors was to deprive them of all rights, whilst leaving the other two properties available to the beneficiaries to whom they were bequeathed. There is another matter which arises and which slightly complicates the matter, and that is that by reason of the insufficiency or absence of any residuary estate of Rebecca all these properties will have to contribute to her debts and will have to abate. The properties which were sold by the bank, the executors of Max Cohen, were sold in 1953, and the other two properties were sold in 1954 and 1956. No. 252 Kingsland Road, London, apparently was not sold to pay debts of any sort, but it was merely sold at the time for the benefit of Maurice Rosen and because the property was in bad repair. The remaining properties which were sold in 1956 were apparently sold for the purpose of paying the debts of Rebecca Cohen.

The position is that the course of events which has happened may deprive some of the beneficiaries of any benefit under Rebecca's will unless there is some adjustment out of the funds which are available so that the burden falls equally upon all the persons who stood and stand to benefit not only under the will of the testator but also under the will of the testatrix, Rebecca, on exactly the same footing, and it certainly seems hard on those who will lose everything while others might get a reduced amount under the will of Rebecca. It seems to me this is a case in which the principles of equity ought to be applied. The matter is complicated by the fact that the bank were executors both of the testator's will and of Rebecca's will, and, of course, there is this observation to be made, that at the actual time when the properties were sold the individual properties were regarded as part of the estate of Rebecca Cohen contrary to the principle which was stated in the well-known case of *Sudeley* v. *Attorney-General*,[1] decided by the House of Lords. Strictly speaking, Rebecca had no definite interest in any of the properties which she attempted to dispose of by her will, and a very curious, novel and unusual position arises for that reason. As I have said, this is a case in which equity ought to try to do justice by equality, and I can find authority which will justify me in applying that rule.

Mr. Wilberforce has called my attention to *Tombs* v. *Roch*,[2] decided in 1846: the facts were not the same as the facts in this case, but Knight-Bruce V.-C. came to the conclusion in that case that the amount necessary to complete the payment of the specialty debts must be contributed rateably by the specific legatees and devisees. After saying[3] that this was a question of "... contribution, which, if it differs from marshalling, does so in species rather than generically, in form rather than in nature," the Vice-Chancellor went on to say[3]: "I should thus express myself had *Aldrich* v. *Cooper*[4] not existed; but I may add, that, cautious and measured as was the language in which, generally, and in that case especially, Lord Eldon spoke, he would not, in my judgment, have used the words, 'they shall not disappoint another person, who the testator intended should be satisfied,' 'as strong an inclination of the testator,' and 'that denotation of intention,' had he taken a different view. It is equally unnecessary, I think, to refer to what Lord Hardwicke (in 1751) is reported as saying: 'The court will order it so that everybody may have satisfaction, and the whole intention complied with.'"

There is a note in volume 14 of Halsbury's Laws of England,

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[1] [1897] A.C. 11; 13 T.L.R. 38.

[2] (1846) 2 Coll. 490.

[3] Ibid. 502.

[4] (1803) 8 Ves. 382.

3rd ed., at p. 611, note (*g*), which seems to me to support the same principle. I am referring to the authority quoted in the note rather than to the article in the volume. In note (*g*) it is stated: "*Aldrich* v. *Cooper*,[5] *per* Lord Eldon L.C. (' A person having two ' funds shall not by his election disappoint the party having only ' one fund; and equity, to satisfy both, will throw him, who has ' two funds, upon that which can be affected by him only, to ' the intent that the only fund to which the other has access ' may remain clear to him ')." That, of course, is not this case.

The next passage, which is a quotation from the book written by the famous American jurist, Professor Story, is in these terms: " ' . . . In the sense of a court of equity, the marshalling of ' assets is such an arrangement of the different funds under ' administration as shall enable all the parties having equities ' thereon to receive their due proportion, notwithstanding any ' intervening interests, liens, or other claims of particular ' persons to prior satisfaction out of a portion of those funds ' (Story's Equity Jurisprudence, s. 558)."

Therefore, it seems to me, the principle which I ought to apply in the present case, namely, that equity will attempt to do justice among all the beneficiaries on an equal footing, is clearly recognised both by Lord Hardwicke and by Professor Story, and supported by Lord Eldon and by Knight-Bruce V.-C. Consequently, in the present case, the beneficiaries ought to bear the burden of the debts which were taken out of the proceeds of sale of some only of the properties equally and rateably among them, and in the same way they will have to abate rateably for the purpose of claiming under the testatrix's estate.

Argument was then addressed to the court on question 6.

Michael Albery Q.C. and *B. S. Tatham* for the bank.

R. O. Wilberforce Q.C. and *Alan Campbell* for Lily Rosen. In *Fielding* v. *Preston*[1] it was held that in case of insufficiency specifically devised and bequeathed freeholds and leaseholds had to contribute to the payment of annuities, and it was there held that for the purposes of contribution their values were to be taken as at the date of the testator, not of the tenant for life: see also *In re John.*[2] In the present case the value taken should be market value at the date of distribution and not probate value;

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[5] 8 Ves. 382, 395.

[1] (1857) 1 De G. & J. 438.

[2] [1933] Ch. 370.

and although there is no authority on the point, the abatement for the purpose of benefiting under the testatrix's will should be on the basis of market value.

Michael Browne for Stanley Cohen. What happened was that the bank, to work out the abatement, opened a separate legacy account for each specific devisee or legatee, took the probate value of the property in question and then abated it by an appropriate proportion bearing the same relation to the probate value as the total money in hand had to the total probate values. Then, instead of paying the legatee that amount, they sought to pay the legatee the actual realised value of the legacy less the deficiency calculated by reference to probate values. That worked very capriciously in some cases and what the bank did was wrong.

James Mitchell, for Maurice Rosen, took no part in the argument.

DANCKWERTS J. I have dealt with question 5; and question 6 raises a similar question of contribution, really, as between the specific devisees under the testatrix's will, and the question of contribution for payment of the debts of the testatrix.

The authorities seem to be inclined one way, so far as I can see, so far as the question of contribution for the purpose of paying debts is concerned, namely, *Fielding* v. *Preston*[1] and *In re John.*[2] The answer seems to be that the probate value, the value of the property to the testator, must be taken. Consequently, it seems to me that, for the purpose of paying debts, their contribution, in the case of the estates of both the testator and the testatrix, must be on the basis of the probate value.

These properties were sold, of course, for certain sums, and the question which arises under question 6 is whether they should abate for the purpose of the funds which the beneficiaries receive in the form of cash according to the probate values of the properties in question, or whether they should abate having regard to the sums at which the properties were, in fact, sold. That does not appear to be covered by any authority, but it seems to me that if they contribute on the basis of the probate value they ought to abate on the basis of the probate value; otherwise very odd results would occur, and, accordingly, it seems to me that I ought to answer question 6 in the same way—probate value.

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[1] (1857) 1 De G. & J. 438.

[2] [1933] Ch. 370.

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COHEN, DECD., *In re.* NATIONAL PROVINCIAL BANK LTD. *v.* KATZ.

As to questions 3 and 4, question 3 appears to me now to be put an end to, and it will be only question 4 that will go back to chambers.

Order accordingly.

Solicitors: *Haslewoods for Bosley & Co., Brighton; Alfred Bieber & Bieber; Gilbert Samuel & Co.*

K. R. A. H.

1959
June 5, 8, 9, 10, 11, 12.

Upjohn J.

In re NATIONAL COAL BOARD'S APPLICATION.

[1957 N. No. 1056.]

Mines and Minerals—Coal—Working—Permission to let down surface—Compensation—Persons entitled to compensation—Whether consequential damage included—Whether compensation payable for loss of profit and goodwill—Costs of application—Mines (Working Facilities and Support) Acts, 1923 *and* 1925 (13 *&* 14 *Geo.* 5, *c.* 20 *and* 15 *&* 16 *Geo.* 5, *c.* 91), *ss.* 6 (1) (2) (5), 9 (1) (2)—*Coal-Mining (Subsidence) Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 59), *s.* 6.

On an application by the National Coal Board under the Mines (Working Facilities and Support) Acts, 1923 and 1925,[1] for the right to work certain seams of coal, and in so working, to let down the

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[1] Mines (Working Facilities and Support) Act, 1923, s. 6: "(1) Where "a matter is . . . referred to the Com- "mission, the Commission, if satisfied "that the requirements of this Part "of this Act are complied with in the "case of the applicant, and that it is "expedient in the national interest "that the right applied for should be "granted to him, may, by order, "grant the right on such terms and "subject to such conditions, and for "such period, as the Commission may "think fit, and upon such an order "being made, the right specified in "the order shall, subject to the pro- "visions hereinafter contained, vest "in the applicant. (2) Where such a "right is granted, such compensa- "tion or consideration as in default "of agreement may be determined by "the Commission shall be paid or "given by the applicant in respect "of the acquisition of the right to "such persons as the Commission "may determine to be entitled there- "to. . . . (5) In determining "whether any right should be "granted or the conditions upon "which any such right should be "granted the Commission shall have "regard to all the circumstances of "the case, and in particular to the "extent to which the retention of "any minerals is required for the "protection of any mines or other "works from flooding, or for any "other mining purpose, and (so far "as relevant) to the royalties, cove- "nants, and conditions reserved by "or contained in the applicant's "existing mining lease or leases (if "any), or customary in mining leases "in the district."

S. 9: "(1) Where a right to work "minerals or an ancillary right is surface, the only question remaining in issue was the measure of compensation to be paid by the board for damage caused by letting down the surface in an area where the board had no clear right to withdraw support. The objectors to the application claimed that the compensation should include full consequential damage extending to loss of profit and goodwill. They included owners of the surface lands, many of whom were industrial concerns; local authorities who owned sewers in addition to surface land; persons whose land lay partly inside and partly outside the application lands and persons whose land lay wholly outside the application lands and which to a lesser degree but extending over a wider area would be affected by subsidence from the proposed workings. The National Coal Board contended that the compensation should be limited to physical damage having regard to past practice and the trend of modern legislation, but that even if some measure of consequential damage were payable the board, being a nationalised body with a duty, in the national interest, to produce coal as cheaply as it could, should not have to pay for the loss of profit of private concerns:—

Held, (1) that the right to compensation for the ancillary right to let down the surface should be treated as a term or condition of the right to work under section 6 (1) of the Act of 1923, and not as compensation therefor under section 6 (2), and that the court had, accordingly, to have regard to all the circumstances of the case pursuant to section 6 (5).

(2) That, in the circumstances, if anything less than full compensation for consequential damage were granted it would amount to expropriation of the valuable right of support; that the court could not properly make such an order unless the obligation was clearly imposed on it by statute, and that it was clear that the Act imposed no such obligation.

(3) That local authorities, unless they were also the owners of the surface land, had no right of support for their sewers, and, therefore, they had, apart from their statutory rights under the Coal-Mining (Subsidence) Act, 1957, no rights for which they could be compensated.

"granted or any restriction on the "working of minerals is imposed "under this Part of this Act, the "Commission may determine the "amount and nature of compensation "or consideration to be paid or given "and the persons to whom it is to be "paid or given, either at the time "when they determine whether the "right should be granted or the "restrictions imposed or at any subsequent time. (2) The compensation or consideration in respect of "any right, including a right to "enforce restrictions, shall be "assessed by the Commission on the "basis of what would be fair and "reasonable between a willing grantor "and a willing grantee, having "regard to the conditions subject to "which the right is or is to be "granted."

R.S.C., Ord. LIVo, r. 1: "Applications under any enactment which "are referred to the High Court pursuant to section 1 (1) (*a*) of the "Railway and Canal Commission "(Abolition) Act, 1949, shall be made "in the Chancery Division by ex parte "originating summons."

Newcastle-under-Lyme Corporation v. *Wolstanton Ltd.* [1947] Ch. 427; 63 T.L.R. 162; [1947] 1 All E.R. 218 applied.

(4) That persons whose land lay partly in and partly outside the application lands were entitled to compensation limited to land inside the application lands, while persons whose land lay wholly outside the application lands were not entitled to compensation, since their lands were not affected by the order.

(5) That although it may have been thought right in similar applications in the past to make no order as to costs, no such general practice had been established, and in the circumstances of the present case, but without laying down any rule, the National Coal Board should pay the costs of the objectors.

In re Wolstanton Ltd.'s Application [1952] Ch. 519; [1952] 1 All E.R. 678n. not followed.

ADJOURNED SUMMONS.

The National Coal Board by an application dated September 3, 1957, under the Mines (Working Facilities and Support) Acts, 1923 and 1925, asked for the right to work certain seams of coal and by such working to let down the surface of certain lands in or in the vicinity of the City of Stoke-on-Trent, the Borough of Newcastle-under-Lyme and the Rural District of Stone, Staffordshire.

There was also an application to vary in certain respects an order made by the court on February 20, 1952, under the same Act (*In re Wolstanton Ltd.'s Application* [2]). The following statement of facts is taken from the judgment:

The application related to three contiguous areas; the Wolstanton Area; the Deep Pit Area and the Stafford Area, in none of which had the board any clear right (except for certain small parcels of land) to withdraw support from the surface. In broad outline the application sought to get liberty to work and to let down the surface in these areas by works proposed at much greater depth than hitherto. The application did not ask for a right to let down the surface outside the areas by the workings within the area. The earlier orders relating to the Wolstanton Area related to comparatively shallow seams, but it was now sought to work from depths of over 2,000 ft., down to 4,000 ft., and to employ the most modern methods of extracting coal by driving horizon roads at these depths. Horizon roads were horizontal; they did not follow the strata, and the object was to enable locomotives to haul underground coal extracted very considerable distances—much longer distances than was possible when coal was extracted through a number of private colliery companies.

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[2] [1952] Ch. 519; [1952] 1 All E.R. 678n.

The reason for the application was that the coal in this coalfield, the North Staffordshire Coalfield, was a very high quality carbonising coal, and, according to the application, the reserves of that type of coal were rapidly diminishing in other coalfields, and it was desired to exploit the high quality coal to be found in the coalfield and to extract something over 119,000,000 tons of coal under the application area.

It was proposed to expend large sums—something over £30,000,000. The plan was essentially a long-term plan and liberty was asked to work for a hundred years from the date of the order.

When the application was made, in the usual way advertisements were directed, which brought no less than 95 objectors. However, that number had diminished, and 64 entered an appearance, most, but not all, of whom had appeared.

Opposition was, however, withdrawn to the proposed method of working, the parties having come to terms on that issue, and the only question remaining in issue was the measure of compensation to be paid by the National Coal Board for the right to let down the surface. None of the objectors was asking to be paid a royalty.

Sir Andrew Clark Q.C. and *J. C. Leonard* for the National Coal Board. The application area originally formed part of the Manor of Newcastle-under-Lyme, which belonged to the Duchy of Lancaster, and the surface land was formerly copyhold. The National Coal Board have, since January 1, 1947, been the owners of all seams of coal underlying the application land and land subjacent and adjacent thereto. The board as successors in title to the Duchy of Lancaster already have a right to work the coal and let down the surface of certain land, and no additional rights in respect of that land are sought on this application. The application lands were formerly copyhold and the board have either no right to work and let down the surface or, if they have a right to work, no right to let down the surface, or their rights are uncertain and cannot be clearly ascertained.

Before the Coal Industry Nationalisation Act, 1946, the position in the application area was as follows: the coal had been worked from earliest known times on the basis of a belief that there was a custom of the manor that the lord of the manor was entitled to work the coal and let down the surface without paying any compensation for surface damage, although in practice ex gratia payments had been made. In *Hilton* v. *Earl Granville*[3] the court held in respect of the Wolstanton area that this alleged custom of letting down the surface without payment of compensation was unreasonable and therefore an invalid custom. The Duchy was not a party to that action and never seems to have regarded themselves as in any way bound by the decision in *Hilton* v. *Earl Granville*,[3] and the alleged custom of working and paying some sort of compensation on an ex gratia basis continued.

In *Newcastle-under-Lyme Borough Council* v. *Wolstanton Ltd. and Duchy of Lancaster*[4] the corporation brought an action in respect of subsidence damage to a fire station, and the defendants pleaded in defence the alleged custom to let down without paying compensation. The validity of that custom was tried as a preliminary point of law, and Farwell J. felt himself bound by *Hilton* v. *Earl Granville*[5] and held that the custom was unreasonable and declared it invalid. He was confirmed by the Court of Appeal[6] and the House of Lords.[7] The case was remitted to the Chancery Division to be dealt with on the basis of that declaration, and Farwell J. in 1941 granted an injunction against the Duchy. That injunction was granted in wartime, when the getting of coal was of vital importance, and the question was considered whether another action should be started alleging a different custom—a right to let down subject to payment of compensation. But owing to the urgency it was decided to apply instead to the Railway and Canal Commission under the Mines (Working Facilities and Support) Acts, 1923 and 1925, for leave to work. The judge had said that his order did not prejudice an application to the commission.

On December 17, 1943, the commission made an order permitting the Wolstanton Collieries to work two seams; it was an agreed order and will be referred to as the "First Wolstanton "Order." It was found, however, that the liberty to work given by that order was not sufficient, and the Coal Board (nationalisation having taken place on January 1, 1947) made an application to the Chancery Division (to whom the jurisdiction of the commission had been transferred by the Railway and Canal Commission (Abolition) Act, 1949) for leave to work four seams; that application was opposed. In that application [*In re Wolstanton Ltd.'s*

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[3] (1844) 5 Q.B. 701.

[4] [1939] 3 All E.R. 190.

[5] 5 Q.B. 701.

[6] (1939) 55 T.L.R. 965; [1939] 3 All E.R. 597.

[7] [1940] A.C. 860; 56 T.L.R. 794; [1940] 3 All E.R. 101.

Application [8]] Danckwerts J. gave leave to work the seams subject to the imposition of certain precautions as to the working. That order is referred to as the "Second Wolstanton Order" and is still in force; it affects the whole of the Wolstanton area, but not any other part of the application land.

The National Coal Board was advised that unless evidence could be adduced to support a different custom from that which was alleged in the *Wolstanton* case,[9] the decision in that case would be followed; in view of the difficulty of getting evidence after this lapse of time, and the obvious inconvenience and delay of attempting to do anything of the sort, the board decided that in order to clear up the whole matter they would apply under the Mines (Working Facilities and Support) Acts, 1923 and 1925, to work the whole area so as to regularise what may well have been unauthorised working in this area. It would be convenient to refer now to the relevant sections. [Reference was made to sections 1 (1) (*a*), (*b*); 3 (1), (2) (*a*), (*b*), (3); 4 (1); 5 (1), (2), (3); 6 (1), (2), (3), (4) (*a*), (*b*), (5); 14, of the Act of 1923.]

Section 6 (1) throws the onus on the Coal Board, first to satisfy the court that it is in the national interest, taken in the broad sense, that these rights should be granted. Once the court is satisfied of that, the court has a discretion which has to be exercised in the manner indicated in the section. The whole test throughout is national interest, not the interest of private individuals.

The next relevant statute is the Coal Act, 1938, under which compensation for damage to the surface from mining operations was clearly limited to physical damage: see Sch. II, para. 6. That Act was followed by the Coal-Mining (Subsidence) Act, 1957, which provided for compensation in all cases, except that where people had rights at common law or under leases, they could elect whether to stand on those other rights or to rely on their statutory rights; but they could not go under all three. Under this Act no payment for consequential damage was given; the board could either repair the damage or make a payment for the cost of repairing it. That Act provides also a right to get payment for the cost of repairing damage to sewers for which there is no statutory right of support.

Those are the relevant statutory provisions which express the view of the legislature as to the proper compensation which ought in the national interest to be paid, and the legislature ought to be in the best position to judge what is in the national interest. In the vast majority of mines no question of paying for consequential damage would arise because where the land and minerals were in the same ownership the board did not come to the court under this Act but under the Coal Act, 1938; and where there is a lease it is almost unknown to provide for consequential damage, but to provide only for damage to land or buildings and land. It would be a strange anomaly if one were to get one or two little pockets in the country where commercial undertakings were entitled to consequential damage simply because they were on land formerly the copyhold of a manor where there was no custom to let down the surface and no right to do so.

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[8] [1952] Ch. 519; [1952] 1 All E.R. 678n.

[9] [1952] Ch. 519.

The National Coal Board offer to make good all damage to the surface and buildings thereon, all plant, fixtures and chattels, whether within the scope of the Coal-Mining (Subsidence) Act, 1957, or not. They offer more than both Acts, except in the case of pipes and sewers that have no right to support, because, if they have no right to support, this order does not affect them and they are not damaged by it, and their owners must rely on their right under the Act of 1957, which was brought in especially to protect sewers which have no right of support, and cannot rely on a jus tertii: *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.*[10]

To include consequential damage would not only be anomalous —because it would only apply in certain places which are purely fortuitous because of the custom of the manor—but would be contrary to the policy of the legislature. It would be against the national interest particularly so far as claims for loss of profit or goodwill were concerned. It would be a strange thing for a nationalised industry not operating for private gain, and whose statutory duty it is to supply the community with coal as economically as possible, to be forced to increase its charges to the public for coal, so as to provide profits for individual shareholders in other companies. The board accepts the liability to remedy all damage, but not to provide the surface owners with profits and gains.

Moreover, alleged loss of profit and damage to goodwill is difficult to assess; everybody has exaggerated ideas of what is their loss of goodwill and what their profit might have been, and it would inevitably involve lengthy and expensive litigation to determine what profits might have been earned. To include such claims would gravely embarrass the National Coal Board because (1) of their unknown quantity; (2) of the difficulty of testing them and arriving at the true figure; and (3) in heavily industrialised areas, where there would be a number of such claims, the impossibility of deciding whether or not it would be economical to work certain seams of coal at all. Where it is only a question of damage to structure the board has vast experience of assessing the cost of such damage.

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[10] [1947] Ch. 427; 63 T.L.R. 162; [1947] 1 All E.R. 218.

The orders made in the past only included consequential damage by agreement where it was offered in the first instance, in very special cases and to a very limited extent. There have been only four orders in which consequential damage was included out of some 60 odd orders which the board has examined: two of those were the two Wolstanton orders. The objectors contend that the Wolstanton order [*In re Wolstanton Ltd.'s Application* [11]] deals with this area and therefore it ought to be followed. That was a rush case to get the order through; it was not thought that consequential damage mattered much, and it was not a commercial area. The offer was made voluntarily and there was no decision on it. The point, therefore, has never been argued.

Charles Russell Q.C. and *John Brunyate* for a number of opposing firms. The Coal Board must be treated for the purpose of this application as coming before the court with no right to let down the surface and at risk of having an injunction granted against them. If they did let down and cause damage they would be liable to the full extent of common law damages for tort, which, to use the general phrase, would include "consequential "damage." The surface owners from the common law point of view would have not only a right to an injunction, but they would have also a right, flowing from the commission of the tort, to common law damages which—subject only to the common law rules of remoteness—it is conceded include consequential damage. It is on that basis that the question of what is the proper compensation must be approached.

There is no conceivable justification in the face of opposition for providing in exchange for freedom from injunction—namely, a freedom to let down—compensation on a basis less than the common law right to damages.

The objectors are in the position of willing grantors, and what willing grantors would willingly agree to waive their right not only to an injunction, but also to accept less in compensation than their existing rights? That is to say, less than the common law measure of damages. There are two matters for consideration under the Act of 1923: (1) whether the right should be granted, and (2) what compensation shall be paid for the right so granted. Compensation when the matter comes before the court is dealt with in section 6 (2) and (5).

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[11] [1952] Ch. 519.

If an unwilling grantor be supposed, then the right sought would to that extent be an expropriation, and that is the reason why the Act provides that compensation shall be assessed on the basis of willing grantor and willing grantee, because otherwise it might be said, "the only proper compensation is that which I "would demand, and I am going to demand the earth for this "because I am unwilling." To that extent it is expropriation or compulsory acquisition of that part of their property. That supports the proposition that it cannot be described as unreasonable that a willing grantor, who has no other irons in the fire at all, should say that he must have not less than he now has in his claim against the board. When section 6 (5) is considered, it must be borne in mind that, where there is a mining lease by a surface owner who owns the surface and the minerals, he has another iron in the fire, for it is in his interest that as much coal should be worked as possible, which would be reflected in the royalty paid to him.

A willing grantor is a free agent, prepared to make a "grant," provided fair and reasonable consideration is obtained in all the circumstances of the case; he is not an anxious grantor: *Inland Revenue Commissioners* v. *Clay.*[12] There is no justification for imposing a term of compensation less than common law damages; it could hardly be described as fair and reasonable that this court of equity should give less compensation for letting down the surface than is given by the common law. It is contrary to the statute in fact to give less than consequential damages.

Of the grounds urged against this contention it was first said that there is legislative precedent which the court should follow confining the compensation to physical damage. That suggestion was in part tied to the argument that in assessing the compensation, as distinct from granting the right, regard should be had to the national interest. The national interest comes in at an earlier stage when it is decided whether or not to grant the interest. Section 9 says nothing whatever about national interest.

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[12] [1914] 3 K.B. 466; 30 T.L.R. 573.

The Coal Act, 1938, provides for compensation on a physical basis under paragraph 6 of Schedule II; that is only applicable where the surface owner was under the very same Act being paid for his coal, and the position reflected there is that there is no severance of surface and minerals and the surface owner wishes to dispose of his minerals at the best price, and in granting the right to let down to the mineral workers he is willing to confine future claims to physical damage because he is interested in turning his minerals to good account. That Act shows that the only circumstance in which compensation is limited to physical damage by the legislature is that in which the man who is being compensated for letting down is the man who is being paid under the same Act for the market value of his coal. That Act is not a pointer at all as to what the court should do in this case. If anything it points in the opposite direction.

The next Act relied on was the Coal-Mining (Subsidence) Act, 1957, but that Act does not help the argument of the board. That Act extended the provisions for compensation of the Coal-Mining (Subsidence) Act, 1950, which related only to small dwelling-houses. These Acts give a statutory right to compensation to those who have no common law right at all to complain of withdrawal of support. The Act of 1957 covers everybody; it gives a statutory right to damages rather less than common law damages for tort in cases where there is no right to support. Section 6 (1) makes it plain that full common law rights are preserved but at the same time that those common law rights cannot be asserted if a claim is made under the Act for the statutory rights given by it. That is scarcely a sound foundation on which to suggest that there is a statutory precedent for the order which the court is now asked to make. There are other statutes which proceed on the same basis: see Brine Pumping Subsidence Act, 1891.

It is not desired to take up much time with the alleged precedents in the orders in other cases, because it is extremely difficult to say whether any of those orders were precedents.

[Upjohn J. I need not trouble you about that. What I have before me is a long series of extracts from orders, but I do not know anything about the subject-matter of any of the applications.]

One of the orders was in a case in which the surface owner, whose surface was going to be let down, was also the owner or otherwise interested in the royalty to be paid for the working of the coal. It is not suggested that they are all such cases, but that is given as an instance.

[Upjohn J. They are not precedents. In 99 cases out of 100 I have no doubt they were agreed out of court, and everyone thought that he was making the best possible bargain that he could.]

The position is not — as has been suggested — necessarily restricted to odd bits of copyhold land at all. Under the Coal Act, 1938, if there was severance of surface and mines without a mineral lease and no right to withdraw support or let down, it did not matter whether it was freehold or originally copyhold.

Arguments were put forward, not really based on the evidence, suggesting that it was against the national interest to make a nationalised industry in the course of getting coal pay for the profits of trading companies. Consideration of the national interest does not alter the basis of the assessment of compensation because the Act of 1923 has not been changed in this regard by nationalisation. It was also suggested that to include consequential damage would lead to inflated damages difficult to assess and wasteful of time and money. There does not seem to be any evidence of that in the Wolstanton area, where they have been working on this basis since 1943.

[Upjohn J. The difficulty in your way is that you have to establish loss of money. No doubt it is difficult to do that, but that makes it more difficult for you, not for the National Coal Board.]

That difficulty has never deterred the common law from assessing damages for tort in this way, and it should not debar a court of equity or the National Coal Board. A court of equity should not be less keen than the common law about restitutio in integrum. It was then suggested that, if the board had to deal with consequential damage, claims might make it impossible to work the minerals or some of them, embarrass the board and prevent them from getting the coal; but for many years they have been working on a basis of consequential damage in certain areas. Just because there happens to be coal under the land of these objectors, and subsidence may be caused while coal is being extracted for the benefit of the general public, is not a reason that they should be out of pocket on granting the board a right to let down the surface in the national interest. That would not be fair or reasonable. It is enough to fulfil the Act of 1923 and avoid sterilisation of coal that the National Coal Board should have removed the fear of injunction.

B. J. M. MacKenna Q.C. and *D. A. Grant* for the West Midlands Gas Board. There is a presumption in the construction of this statute, as in all others, that the legislature did not intend that there should be confiscation either total or partial. If property is taken from the owner without giving him in return its full value, there is confiscation, which may be either total or partial. Value in this context means value to the dispossessed owner. The value of a right of support to the owner is the protection which it gives him against possible loss from subsidence. The extent of that possible loss, therefore, is the extent of the protection, and the value of that right depends on the use to which the owner is putting his land. If he is using the land for business purposes, subsidence is likely to cause business loss in making good the physical damage to the property on the surface.

One therefore approaches the Act of 1923 with a presumption that Parliament did not intend that, if the right to support were taken away, the court in fixing compensation should disregard the value of that right as a protection against losses, including business losses caused by subsidence. There is nothing in the language of the Act to rebut that presumption against confiscation, and nothing which requires or authorises the court to give anything less than the full value to the owner of the right which has been taken away from him. On the contrary, the language of the Act indicates that the owner should receive full value for the right taken away: see sections 4 (1) (*d*) and 9 of the Act. Section 4 (1) (*d*) shows an intention on the part of the legislature that the terms of acquisition fixed by the court should not be less favourable than those which could reasonably be demanded in negotiation. A single owner who asked for no more than losses, including business losses, would not be unreasonable within the meaning of section 4 (1) (*d*). The court ought not to give less than full indemnity under whatever head it acquires jurisdiction, whether under (*a*), (*b*), (*c*), or (*d*) of section 4 (1).

The right conferred by an order under the Act to receive money on the future happening of damage is compensation or consideration. Those are the words used in section 9. It may well be argued that the sum of money which will be paid in the future when the damage happens is strictly payment of compensation, but, whether that is so or not, the present right which is conferred by the order will be consideration for the right taken away within the meaning of section 9, and, unless it be consideration within the meaning of this statute, the right would be taken away without consideration, which would be inconsistent with section 6 (2).

A similar point arose in *In re Beckermet Mining Co. Ltd.'s Application*,[13] and it follows clearly from that case that the right which is being acquired under this order is either a right to compensation or consideration within the meaning of section 9 (2).

With regard to the first point made on behalf of the National Coal Board that the losses which would be caused to surface owners in working the coal would, if consequential damage were paid, be so large that they could not economically work the coal, then in that case it would be better that the coal should not be worked at all. That point is not supported by the affidavits of the board.

It was not a better argument that the board would be in a difficulty in estimating what their losses would be likely to be and that there would be an uncertainty as to whether it would be economical to work the coal at all. Undoubtedly it would be difficult to establish what the losses would be, but if the National Coal Board wishes to work this coal it must take the chance. Nothing was said about incentive to careful working which would be provided by the order.

It is conceded that damages at common law would include compensation for consequential loss. There is no reason why the surface owner should receive less than that under the Act of 1923. In *In re Naylor Benzon Mining Co. Ltd.*[14] Wynn-Parry J. said that the principle which had been applied in section 63 of the Lands Clauses (Consolidation) Act, 1845, ought to be applied to cases under section 9 of the Act of 1923. *Horn* v. *Sunderland Corporation*[15] explains how the court acted under the Act of 1845.

It was argued for the Coal Board that it was under a statutory duty not to make a profit. There is nothing in the Coal Industry Nationalisation Act, 1946, which puts a different duty on the board from that which the Gas Act, 1948, puts on my clients; under each Act each authority is under a duty to conduct its organisation as efficiently and economically as possible.

Henry A. P. Fisher, for the British Transport Commission, consented to the order according to the terms of an agreement concluded with the board.

R. D. Stewart-Brown Q.C. and *J. S. Daniel* for a number of opposing firms. The arguments of Mr. Russell and Mr. MacKenna are adopted. This application is the third of a series of encroachments upon the existing rights of surface owners in this coal area, and each of them has been on a greater scale. It is true that full compensation was in the earlier order, but non constat, if it had not been offered, that increased working rights would have been granted. If the judgment of Danckwerts J. in *In re Wolstanton Ltd.'s Application* [16] is read fairly, it is apparent that he only granted the rights that were sought provided certain restrictions on working were imposed and full compensation was offered. In this application, which is for increased rights in a larger area, it is plain that the surface owners would have been in a very grave difficulty in asking for any greater protection than that accorded in the earlier order, but it is now said to the objectors that they are not this time to be given their full compensation. This is a gradual process of sapping the position of the surface owners and encroaching further and further on their rights. It has been put forward that it has not been the policy of Parliament, and that it should not be the policy of the courts, to inflict on public bodies, like the National Coal Board, the burden of dealing with a claim of this nature. It is plain from *Horn* v. *Sunderland Corporation* [17] that since before the Act of 1845 Parliament had imposed on government departments, local authorities, and public bodies such as statutory undertakings, the obligation to pay this type of claim and to bear all the consequences that go with it.

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[13] (1938) 54 T.L.R. 377; [1938] 1 All E.R. 389.

[14] [1950] Ch. 567; 66 T.L.R. (Pt. 1) 418; [1950] 1 All E.R. 518.

[15] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

Peter Foster Q.C. and *John Bradburn*, for other firms, adopted arguments already put forward on behalf of the objectors.

John Arnold Q.C. and *Charles Sparrow* for the Staffordshire County Council. The council is represented fairly widely over the face of the area in relation to schools, police houses and such like. They are also proprietors of pipes and therefore have a special interest in another aspect of the matter, which does not affect the other objectors. The arguments already advanced on this matter which are common to all the objectors are adopted. There are one or two matters to be mentioned quite briefly. If something less than full compensation for damage is to be part of the court's order, then it will necessarily follow that the court will have enabled the National Coal Board to do damage to some people which they will not be required to requite. The board sought to justify what at first sight seems to be an appalling proposition by saying (1) that the national interest demands that

[16] [1952] Ch. 519.

[17] [1941] 2 K.B. 26.

this should be done, and (2) that some standard has been provided to which the court should adhere. Both propositions are false; the first because in this part of the jurisdiction the national interest plays no part, whether this be a matter of compensation or consideration under section 6 (2) or of terms and conditions under section 6 (1). As to the second, there is no such standard; it sought to rest that standard on two matters; first, that counsel for the board had never seen a lease with a full compensation provision, but it did not emerge what proportion of leases he had seen; and, secondly, it was said to emerge from paragraph 6 of Schedule II to the Coal Act, 1938. But no reading of that paragraph can possibly lead to the result that a person who had no coal expropriated under that Act, and who is a surface owner, can be let down under the powers granted by that Schedule; any other construction would lead to the conclusion that a right of support had been expropriated with no compensation at all, because there is no provision for compensating such a man in the whole of the Coal Act, 1938. The court has a disincentive for construing Acts of Parliament to yield that result: *Minister of Health* v. *Stafford Corporation.*[18]

As regards pipes and sewers, in the Wolstanton order of 1952 the applicants were ordered to pay full compensation for all damage, including consequential loss and depreciation in value resulting from mining operations, to gas mains, electricity mains and lines, water mains and sewers.

In *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.*,[19] which is really the foundation of this point, it was held that injury to a pipe by the withdrawal of support through mining operation was not protected, the corporation not having the right to support for their gas mains if they did not own the surface. That position was put right by the Coal-Mining (Subsidence) Act, 1957, so that the council is protected as regards physical damage.

[UPJOHN J. It is difficult to see what consequential damage owners of pipes, such as local authorities, can suffer.]

What could happen, although it is not suggested that it will happen here, is that owing to subsidence the gravity flow could not be relied on, and then one would have to pump, and the pumping would be a consequential loss. That would not apply to electricity or gas mains; it would really only apply to the sort of pipe which carries a liquid, like a sewer; it is a very limited matter.

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[18] [1952] Ch. 730; [1952] 2 T.L.R. 302; [1952] 2 All E.R. 386.

[19] [1947] Ch. 427.

It was said on behalf of the Coal Board that the court is not obliged to prescribe here the same standard of compensation which the law already lays down in a case in which the same problem arises outside the ambit of the Act of 1923. It was sought on that ground to distinguish the cases which lay down that for tortious interference by mining with a right to support which causes damage full consequential loss and depreciation were included. That is common ground. It was said that this is not necessarily the standard which the court should apply in determining the terms under this Act. It is submitted equally that the fact that no consequential damage is awarded by way of compensation for consequential loss, caused through a fracture or bending of the council's pipes outside the ambit of this jurisdiction, is no reason why the court should not impose such a term as one of the terms on which it grants this right to work and let down.

[UPJOHN J. You have come to some agreement?]

We have come to an agreement which leaves this point at large.

[UPJOHN J. Is not that what gives rise to the difficulty? If you had said "I will not agree and I come here opposing you "except on terms that you do this," then I could see much force in your argument, but you have left it open to me to determine as a matter of law, and as a matter of law I would have thought, with regard to pipes and pipes only, you are in a difficulty because you have no right of support since the decision of the Court of Appeal [*Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.*[20]].]

It is clear that if outside the Act of 1957 the council were suing in this court for consequential damage to a pipe they would not get anything. We have not held the board up to ransom, because the question of the level of compensation (whether under section 6 (1) or (2) does not matter) the court can decide in any way it thinks fit. Of course, it can decide that in the context of the mining arrangements embodied in the agreement that we have reached, but it is not a matter of law. This is not a matter where the court has to look at each particular thing and say, is there outside the ambit of this jurisdiction some right to complain of this, or some right to be compensated at a particular level of compensation which the court will then apply? That was rightly disclaimed by the Coal Board as being the proper way to exercise this jurisdiction.

[20] [1947] Ch. 427.

The matter rests, if sections 6 (2) and 9 are the relevant sections, on such terms as a willing vendor might be expected to get, or if section 6 (1) is the relevant section—and that appears to be the better view—then it is such terms and conditions as the court thinks fit. Those are the two criteria; one or other is right; it does not seem relevant to decide which, because in the end the two things may be the same. It is not merely a matter of discovering what is the external law on the subject and applying that as part of the terms of the order, and therefore the council is in no different position than if the matter had been left entirely at large and if they had said a "package deal or nothing," which they could have done.

If the matter be at large, and it seems to be at large, then there is no reason why the court should not grant the council that degree of protection which includes consequential damage, bearing in mind that they are generally involved in this matter. All that the court would be doing would be to ensure that the ratepayers do not have to bear unrequited the pumping charge which may, ex hypothesi, be caused entirely through the activities of the National Coal Board in causing the land to subside, and which ought not, in equity, to be borne by the unfortunate ratepayers.

Eric Griffith for the Archdeacon of Stoke-on-Trent and a number of manufacturers, some of whom were in the application area and some of whom were partly inside and partly outside it. The argument already advanced by Mr. Russell is adopted. There is one further short submission. In section 9 (3) of the Act of 1923 the word "given," which appears in subsection (1), is dropped, and that rather supports the view that section 9 is dealing not only with the position of a payment of money but also with something analogous to a contractual right which might hereafter lead to the payment of money: see note to section 9 in Halsbury's Statutes, vol. 16, p. 200n.

As to churches, there is no reason from the nature or the position of a church, or from the point of view of ecclesiastical persons who may be interested, to differentiate between them and the other surface owners, either in the protective clauses or in the compensation. It is difficult to give concrete examples of how consequential damage might arise, but there are obvious matters affecting a church, such as lighting and heating, where the damage might be very extensive.

As to the persons partly inside and partly outside the application lands, it is submitted that compensation for consequential damage should extend to the whole area occupied by them. It would be an impossible calculation to have to ascertain the extent of the damage under the different parts of the land. If the test be what is fair and reasonable as between a willing vendor and a willing purchaser, no willing vendor is going to expose himself to this type of difficulty. Alternatively, if it is really a question under section 6 (1), then one is thrown back on what the court thinks is reasonable, and it is only reasonable that the analogous situation of these objectors should be cleared up. Some factory premises are situated astride the line dividing the application land from that outside. Other objectors have one factory inside and another just outside. There cannot be any rigid rule of thumb test where one draws the line, but one can tell on which side of the line a particular case falls purely as a matter of common sense. Is it a very close union of two factories?

All these are matters of speculation because this is a heavily undermined area and nobody knows exactly what is likely to happen or where it is likely to happen as the work proceeds, but there is a risk that mining in the area will affect a considerable number of premises outside the area. On that footing there is a risk that mining in the area will affect the land not only inside the application area but just outside it, and this is the sort of case where it is not unreasonable for those with premises in the application area to hold the Coal Board up to ransom to a mild extent by saying that they should extend to premises, where they are astride the boundary or just over it, the full compensation provisions which are to be given to the area as a whole, so that the very difficult disputes whether certain consequential damage follows from letting down or working of coal within or just without the area may be resolved.

George Hesketh for the Central Electricity Generating Board. This board has come to an agreement with the National Coal Board as to the method of working, but will leave the question whether compensation shall include consequential loss and depreciation in value to be settled by the court on this application, and on that question they support the arguments of Mr. Russell and Mr. MacKenna.

D. A. Grant for the Staffordshire Potteries Water Board. This board has come to an agreement with the National Coal Board; as to the water mains, we have no right to support and shall rely on the Coal-Mining (Subsidence) Act, 1957.

Charles Sparrow for the Trent River Board, the Ministry of Health, the Birmingham Regional Hospital Board and a number of firms, some of whom were wholly outside the application lands. The submissions will relate, first, to what may be called the "rank outsiders," people who are not on the boundary but outside the application land, but who may nevertheless be affected by subsidence from working the coal under the application land. In support of their claim reference is made to the judgment of Danckwerts J. in the *Wolstanton* case,[21] when he said with regard to the Newcastle High School, which appeared to him to be just outside the area of that application, that he thought that it ought to be included in the same compensation provision as the rest of the area as it might be affected by the operations within the area. The test was, would they be affected by the workings within the area? That is the test which is relied on and which the court is asked to adopt. The test is simply what is reasonable.

[UPJOHN J. Is there any provision as to who may object?]

Only section 6, which is the provision under which the court determines what is the amount of compensation.

The evidence of the National Coal Board itself says that subsidence is likely to run up to 520 yards outside the application land, and these "rank outsiders" are well within that area. That is the criterion that the court is entitled to adopt, whether persons are affected by the subsidence.

The Coal Board argues that it is not asking for the right to let down these "outsiders"; but the court has also to consider the conditions upon which it will grant the rights which are sought. One right is a right to let down the application land; but another, quite separate, right is to work the mines in the application area, and it must be plain that the exercise of the right to work the minerals in the application area may well affect these "outsiders" if the mines are worked up to the edge of the application area.

[UPJOHN J. You say that is a right like a right to let down the land.]

I think that it may be. If it is not, it is a little difficult to see how one phrases the restraining conditions. It is a separate right and quite distinct from the right to let down. The application area considered on this basis is a highly artificial one and not necessarily a reliable one. It is unreliable and misleading to direct the whole of the attention in this case on the right to let down in what has been called so far the application area. One has also to consider the other right to be granted, and the parties who may be affected by the use of that right. It may be difficult to know where to draw the line, but these objectors are clearly within the area as extended to include damage which results from working in the application area. On the facts they will be affected by this order, and they are parties to whom consideration ought to be given on the grounds of reasonableness.

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[21] [1952] Ch. 519.

It cannot be reasonable to present the Coal Board with gratuitous permission to wreck a commercial firm—because consequential damage could wreck a commercial undertaking—without reinstatement.

The court has been pressed with the national interest, and again looking at the question from the point of view of reasonableness, if the national interest demands the extraction of this coal, then a fair recompense is a national responsibility; far from it being the duty of the Coal Board to escape that responsibility, it is their duty to assume it.

On the evidence of the board it is shown that, if they take proper precautions, serious damage is not expected to result to structures on the surface from the presence of faults under the surface. That evidence has two consequences: first, that it is very difficult to say in the face of that evidence that the burden of compensation on any basis is likely to be unreasonable or too heavy; and, secondly, that the board have the power to control the damage, and that, if proper precautions are observed, the damage will be slight. In the circumstances it is not unreasonable to penalise them realistically for such damage as may result, because in their own opinion they can avoid serious damage to the surface and to the objectors to this application. This submission is based on a straight question of equity—what is known as "particular equity."

Michael Browne for Stoke-on-Trent Corporation. The corporation have just concluded an agreement, and subject thereto they are in the same position as the Staffordshire County Council, and the argument on their behalf in respect of pipes and sewers is adopted.

Sir Andrew Clark Q.C. in reply. The National Coal Board is a statutory body, whose duty it is to produce and sell coal as economically and as reasonably as they can in the interest of the public. They are not prohibited from making a profit. They are not here as extortioners, but they cannot consistently with their duty to the public give anything away. They are bound to fight on behalf of the public for their rights; they are not in a position to give things away gratuitously: see Coal Nationalisation

Act, 1946, s. 1 (1), (4). On the construction of the Act of 1923, it is submitted that section 9 does not apply to the payment of compensation for surface damage and it has no application here; this matter falls to be dealt with under section 6 (1). Section 9 applies to money paid for the purchase of a right; compensation for surface damage is not paid for purchase of the right to let down the surface at all; it is one of the terms on which that right is granted.

It is important for two reasons: (1) section 6 (1), which applies to terms and conditions, is quite inconsistent with section 9 (2), which brings in the willing grantor and the willing grantee; but there is no scope here on the issue of compensation for bringing in the principle of what a willing grantor or willing grantee might do; they would not be selling a right to let down the surface but granting it subject to the payment of compensation for damage, and that would come in under section 9.

[UPJOHN J. You say that the compensation paid for the right to let down the surface is a term or condition in section 6 (1)?]

Yes, compensation for damage. It is wrongly called "compensation"; it has been called that in practice, but it is compensation for surface damage, and it is damages pure and simple, nothing else, whether it includes consequential damage or is limited to physical damage. They are all terms and conditions, because it is a payment which may never have to be made, and if and when it is made it is not a liquidated sum. Subsection (2) refers solely to what is paid down at the time and contemplates a liquidated sum: but damages for letting down the surface are included under subsection (1), and subsection (5) applies to the terms and conditions on which that right is granted and is distinct from subsection (2). Section 9 refers back to compensation under subsection (2), because it uses the same words and makes it clear that it is something which is paid for the right and not something paid by way of damages for the subsequent exercise of the right. Therefore the compensation here falls to be dealt with under section 6 (1) and (5). Under subsection (1) there is the tie-up with the national interest, because that subsection provides that the court has to be satisfied that it is expedient in the national interest that the right applied for shall be granted, and they then make the order or grant subject to such conditions as they think fit.

In this district it has been customary to let down the surface without payment of compensation; that has been held unreasonable, and therefore the court will not regard itself as bound by something which is unreasonable and will not follow that custom. That must be conceded, but this is a mining country, where people have been used to having their buildings let down, where they expect it and where they ought to take precautions. It is a country where land is sold on that sort of basis and at a price which takes into account the fact that it is a mining country.

The argument on section 4 (1) in relation to the question of the grantor and grantee is fallacious, when it is sought to apply it in a very large area where a very large number of people are involved. It has been argued that it is a question of reasonableness, but it is quite unreasonable to expect anyone to sign a blank cheque for consequential damage which may only exist at some vague time in the future and about which they know nothing. Every mining concern has to look some little way ahead before sinking a large capital sum, and one has to have a mining programme; with a blank cheque one does not know what will have to be faced. If the court does take the view that there should be consequential damage, it should in any event be limited to existing businesses.

It was suggested that the National Coal Board should get the Wolstanton order varied, but the answer to that is that the board made a voluntary offer on the faith of which they were granted a right, and they felt, therefore, that it would be dishonest to go back on that offer.

With regard to the submissions made on behalf of the Staffordshire County Council relating to pipes and sewers which have no right to support, those with no right of support will get their statutory compensation under the Act of 1957 and they are not in any way affected by this order; in the case of sewers which have a right of support, the board is asking for a right to let them down and they will get whatever compensation is awarded.

[UPJOHN J. What about the package deal? Mr. Arnold said: "I have many interests and I have not actually refused to "agree, but really on looking at the matter as a whole it would "be right that a condition of my giving up my limited right to "support over a number of buildings I should have this little bit "extra added on."]

That is a deal which they could have made, but it is not in fact the deal they did make. Had they put that argument forward the board would not have come to terms with them. The court was invited to enforce the agreement that might have been made but which was not—to put a little pressure on the

National Coal Board. That is no part of the court's duty. It is attempting to make the best of both worlds.

On the question of partial outsiders, those objectors asked the court to assume and enforce a bargain between them and the National Coal Board—to hold the board up to ransom. They do not see fit to make any agreement; they also are trying to get the best of both worlds: they say they are keeping their hands quite free so that they can see what can be got from the court, and then they ask for what they might have got if they had not come here and caused all this trouble. It is difficult to see how anything can be put in the order in this respect because, once one puts in people who are outside the application area, the board will want to have liberty to let down this land outside it, and it would become impossible to have an application area because, the moment one draws in from outside, the application area is extended, and one goes further and further outside. One cannot see where it would end.

As to the "rank outsiders," they are entirely unaffected by this order. In the *Wolstanton* case,[22] which was relied on, all that Danckwerts J. was saying was that, on the one outstanding point relating to this school on which there had been no agreement, he was not sure that it was not outside the area, but that the same provision had better be included for it. That order was for all schools together and the board was not arguing that they should not be included. This order does not affect these outsiders at all. They are trying to rely on something which is an even remoter jus tertii than pipes. The right to work the mines cannot affect them at all, because they have no interest in them. The only thing which could affect them would be the right to let down the surface in a band all round the application area, and if they were within that band and the court granted that application, then they would have had a right to compensation; but the board has not done that.

This is not a question of a right in rem; it is a right to work.

G. R. Rougier, for one of the opposing firms, stated during the hearing that this firm had concluded an agreement with the National Coal Board and that they would take no further part in the proceedings.

UPJOHN J. stated the facts and continued: The objections ranged round two main points. First, there was great opposition to the proposed method of working: it was proposed to work by the longwall method, which, as is well known, involves the total abstraction of the coal with an inevitable subsidence of the superadjacent surface. The second point, which is the only point with which I am really concerned in this judgment, is the right measure of damages that the National Coal Board should pay when the surface is let down.

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[22] [1952] Ch. 519.

With regard to the first main point, that is, as to the method of working and the protection to be afforded to the owners of the surface, there have been lengthy discussions; large numbers of affidavits have been filed, I believe something in the neighbourhood of a hundred, and ultimately, after many concessions, no doubt, on both sides, opposition has been withdrawn to the proposed method of working. I propose therefore to say no more about it than this—that I have seen sufficient of the evidence to satisfy me that it is plainly in the national interest that a right to work this coal and to let down the surface should be granted; and indeed, that is not disputed.

Before I propound the problem which I have to solve, I must say a little about the history of this matter.

These three areas all lie in the Manor of Newcastle-under-Lyme. The lord of the manor has from ancient times been the Crown in the right of the Duchy of Lancaster. The Duchy have for very many years claimed the right to work the subadjacent minerals without paying any compensation for subsidence caused to the surface, and have for many years granted mining leases upon the footing that the person extracting the minerals was entitled to do so without paying any damage for subsidence.

It was held in 1844, in *Hilton* v. *Earl Granville*,[1] that such a custom was unreasonable and therefore void. Undeterred, however, by that decision, the Duchy continued to grant leases upon the same terms as formerly, and apparently no one disputed that.

Just before the war the lessee was the Wolstanton Colliery Co. Their workings caused subsidence to a fire engine station belonging to the Borough of Newcastle-under-Lyme, who naturally were rather incensed and brought an action against the company and against the Duchy of Lancaster. In 1940 the House of Lords in *Wolstanton Ltd. and Attorney-General of Duchy of Lancaster* v. *Newcastle-under-Lyme Corporation*,[2] upheld the view which had been expressed some hundred years before that the alleged custom was void as being unreasonable. Accordingly, an injunction was granted against the Wolstanton Co., without prejudice to their right to make application under the Mines (Working Facilities and Support) Act, 1923.

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[1] (1844) 5 Q.B. 701.

[2] [1940] A.C. 860; 56 T.L.R. 794; [1940] 3 All E.R. 101.

It was war time and, of course, essential to get this high quality coal, and on December 17, 1943, the Railway and Canal Commission made an order entitling the company to work certain seams. In that order the company offered a very wide clause offering to pay compensation for subsidence, which was in substantially the same terms as the order subsequently made in 1952, and to which I shall refer in greater detail.

In 1952, the National Coal Board, as the successors of the Wolstanton Colliery Company, made another application in *In re Wolstanton Ltd.'s Application*[3] for extended powers to work certain seams in the Wolstanton Area. Neither of these orders affected the Stafford Area or the Deep Pit Area. Danckwerts J. made an order on February 20, 1952, which in the First Schedule contained a clause, clause 13, dealing with the question of compensation for subsidence, and it is in these terms: "13. The "applicants shall (subject to the provisions of paragraph 12 hereof so far as applicable) pay full compensation for all damage "(including consequential loss and depreciation in value) whether "occurring before or after March 25, 1952 (but not before "December 17, 1943), and resulting from the mining operations "of the applicants or of Wolstanton Ltd. in the Red Mine Ironstone Seam or any of the seams mentioned in paragraph 2 hereof "prior to March 25, 1952, and from such operations in any of the "described minerals on or after March 25, 1952, within the area "surrounded by a purple verge on the said plan Number 1 to "property (including gas mains electricity mains or lines water "mains and sewers belonging to any of the objectors or the "Midland Electricity Board) now or hereafter within the said area "and in the case of the lands coloured pink on the said plan "Number 1 notwithstanding the terms of any enfranchisement "deeds."

Some argument has been addressed to me upon the footing that as the order was made in those terms in 1943 and again in 1952, so it should be made in the year 1959. But I am unable to accept that argument. The National Coal Board cannot be prejudiced by earlier orders in that way, and it is fully entitled to come to this court and to say that for the future, when dealing with deeper and different seams, it would be right and proper to have a different provision as to compensation put in the order that I shall make.

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[3] [1952] Ch. 519; [1952] 1 All E.R. 678n.

The position then today is this: in the Wolstanton Area there is a right to work certain shallow seams on the terms as to compensation for subsidence that I have just read. Apart from that, as the custom alleged is invalid, it is common ground that there is no right to work other seams and to extract other minerals so as to let down the surface; and, as it is well known that the extraction of minerals is bound to cause subsidence, it necessarily means that unless some order is granted, these minerals are sterilised, for an injunction would plainly lie at the instance of any owner of the surface.

The rights now sought, however, are limited as to the damages through subsidence in the way set out in paragraph 5 of the proposed minutes of order. These are the terms proposed by the National Coal Board:

"The applicants shall make good or pay compensation for all "actual damage caused by their working of the described "minerals to the surface of the described lands and to any "existing or future building works and things erected constructed "or growing thereon, including actual damage to any plant "machinery fixtures fittings or chattels in or upon any such "buildings or works, provided that this obligation shall not apply "to any sewers, gas or water mains or electricity cables in respect "of which there is no right of support, in which case the applicants shall only be liable to pay compensation in accordance "with their statutory obligations."

On the one hand—and this is the whole kernel of the point that I have to determine—it is sought by the objectors to have a wide order for compensation for subsidence which would include consequential damage. On the part of the National Coal Board, they are seeking to restrict it to physical damage to the land and buildings, including future buildings, and fixtures and fittings and actual chattels.

The reason for the importance of the difference is that this is, particularly in the Deep Pit Area as appears from any of the plans put in, a highly industrialised area. It is in fact the heart of the Potteries District, and there are on the surface above these lands a large number of industrial concerns, particularly pottery concerns; and the method of making pottery now involves long and heavy kilns.

It is not really in dispute that the result of working might be to cause damage to these kilns, which might upset the production of these companies on the surface; and that might lead to a loss of orders and to a loss of production, with consequential damage to goodwill that that would involve.

I say no more about that, because Sir Andrew Clark, for the National Coal Board, has admitted, first, that it is possible that in each case consequential damage of some kind may be suffered; secondly, that such consequential damage might very well be substantial, especially in cases of commercial undertakings if it were to include loss of profits and damage to goodwill; and, thirdly, that that sort of consequential damage would not be recoverable under the form of order for which the National Coal Board asks.

The question, therefore, is one of great importance. It is a question, of course, of construction of the Act as to what term as to compensation I should insert. I must, therefore, look at a number of sections of the Act, some of them, however, briefly. Section 1 gives the right to make application to work minerals which are in danger otherwise of being unworked. Section 3 gives power to the court to grant what are called ancillary rights. I need not read the section in detail, but it is plain, having regard to subsection (2), that one of the ancillary rights which may be granted is a right to let down the surface.

Section 4 is in these terms: "(1) Neither the right to work "minerals nor an ancillary right shall be granted under this Act "unless it is shown that it is not reasonably practicable to obtain "the right in question by private arrangement for any of the "following reasons: (*a*) that the persons with power to grant the "right are numerous or have conflicting interests. . . ."

That is plainly satisfied in this case. I need not read (*b*) or (*c*). (*d*) is in these terms: "that the person with power to grant the "right unreasonably refuses to grant it or demands terms which, "having regard to the circumstances, are unreasonable."

Then section 5 provides the machinery for launching applications: an application is made to the Minister of Fuel and Power, who considers the application, and if he thinks that there is a prima facie case, referred it formerly to the Railway and Canal Commission, but now that jurisdiction has been transferred to this Division of the High Court.

Section 6 deals with reference to the commission.

[His Lordship read section 6 (1) (2) (5) and section 9 (1) (2) (3) of the Mines (Working Facilities and Support) Acts, 1923 and 1925.]

Here I am concerned with the grant of an ancillary right. The first question which arises is whether this ought to be treated as a term or condition referred to in section 6 (1), in which case the relevant considerations which I must bear in mind are to be found set out in subsection (5) of that section; or whether this right to compensation on damage should be treated as a compensation clause coming under section 6 (2) to which, of course, section 9 is applicable.

The point is not of great importance, because in either event the court must do what in its discretion it thinks fair and reasonable in all the circumstances of the case. It is true that in 1938, in *In re Beckermet Mining Co. Ltd.'s Application,*[4] the Railway and Canal Commission did consider that the clause providing for compensation for subsidence was a clause which fell within section 9, but it is plain the point there was never really argued.

Upon the whole, I think that section 6 (2) and section 9 are really dealing with monetary consideration which is to be paid as a term of the order, and that the clause for payment of damage which may or may not arise in the future, cannot be regarded as compensation for the purposes of subsection (2) of section 6. I think it is a condition or a term which falls within section 6 (1), and the relevant considerations which I must therefore bear in mind are to be found in subsection (5).

It is true, and there has been evidence before me, that since the constitution of the Railway and Canal Commission, either by that commission or by this court, some 62 orders granting liberty to let down the surface have been made; and it is also true that in only four cases has an order been made giving a right to consequential damage, two of those orders being, of course, the orders made in 1943 and 1952 in this case. But I cannot gain any comfort one way or other from those orders. As is well known, these matters are negotiated, as in this case even while the case is being debated, and the parties come to terms and agreements which satisfy them; and one can get no assistance from looking at extracts—for that is all I have—from orders which satisfied the parties and as to which it is admitted that the point I have to consider was never argued.

The objectors' case is perfectly simple; they say the right to support is a valuable right of property which can be protected by injunction. It is not in dispute that if damage does result, consequential damage can be recoverable by law, that is to say, consequential damage from loss of profits, loss of goodwill, and so on; and they submit that to limit the compensation in the way sought by the National Coal Board is to expropriate without paying full compensation; and therefore it amounts to a partial confiscation of the objectors' property, and a confiscation which in individual cases may in the future turn out to be very serious. They submit that that is contrary to all principles of this court, to make such confiscatory orders, unless the terms of the statute plainly entitle the court to do so.

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[4] (1938) 54 T.L.R. 377; [1938] 1 All E.R. 389.

They point to section 4 (1) (*d*), and they pose this question: supposing there was one objector and one only, and his objection was that he wanted to have compensation for consequential damage; could he be regarded as being unreasonable so as to give this court jurisdiction to make some less order? They suggest—and I agree with them—that the plain answer to that must be that, of course, it would not be unreasonable, for the very simple reason that he is only asking for that to which he is entitled at law; and, indeed, he might not unreasonably ask for a little more for giving up his right to claim an injunction to prevent any subsidence to his property. They say that if that be so in cases under sub-paragraph (*d*), so also it must be the same in an application under sub-paragraph (*a*).

The argument of the National Coal Board is this: they say that the statutes in the past have shown that when it is in the national interest, Parliament has thought it right to put some limitation on the compensation to be recovered; and they refer to the provisions in paragraph 6 of the Second Schedule to the Coal Act, 1938. That Act is usually described as the Act which nationalised royalties and vested in the Coal Commission the minerals underlying the surface. It provided in one particular case—that is where there had been no severance, so that the owner of the surface also owned the minerals and enjoyed both in possession—that the compensation due to him should be determined upon the footing that he would be entitled to have compensation for damage arising from the working of that land. That it was said meant physical damage and physical damage only.

I am not going to determine whether that is right or not, for Mr. Arnold, for one of the objectors, was prepared to argue before me that indeed the provision of compensation to be found in that paragraph was wider than had been assumed by the National Coal Board. But, assuming that the view of the National Coal Board is right, it does not seem to me to go any distance to support their submission.

Where a man owns minerals under the land and is notionally going to sell them, he must, of course, grant a right to win, get and carry away, and he must, as a practical measure, also grant a right to let down the surface on some terms.

If, of course, he is content to accept compensation for damage only to the land, he will be able to get a larger royalty. So, as it was put, what he loses on the swings he gains on the roundabouts; and there is nothing I can see in the Act or in that paragraph which entitles me to assume that I ought to limit in any way the compensation which the objectors may justly claim. That paragraph merely deals with the machinery for ascertaining the true and proper compensation.

Then reliance was placed on the Coal-Mining (Subsidence) Act, 1957, which gives a right, in very broad terms, to persons who had no right of support to claim damages or compensation for subsidence in certain cases. But section 6 of that Act made it quite plain that where somebody had a legal right to make a claim, he would not in any way be prejudiced: he merely had to elect whether he would go under the Act which gave him certain rights although he had no right of support, or to rely on his legal rights. That Act again does not support in any way the argument of the National Coal Board.

Then it is said, and said truly, that the National Coal Board is not operating for private gain, but in the national interest. Its duties, as they are set out in section 1 (1) (*c*) of the Coal Industry Nationalisation Act, 1946, are: "making supplies of "coal available, of such qualities and sizes, in such quantities "and at such prices, as may seem to them best calculated to "further the public interest in all respects, including the avoid"ance of any undue or unreasonable preference or advantage."

Under section 1 (4) of that Act they are bound to try to see that the revenues of the board shall be sufficient to meet all their outgoings properly chargeable to revenue account. And so it is said that it would be wrong, when considering the national interest, to place too onerous a burden upon the National Coal Board, because they are under this duty to make coal available to the public reasonably cheaply, and, incidentally, to try and make their revenues meet. It was said in particular that even if some measure of consequential damage should be payable, it would be wrong for the National Coal Board to pay private concerns for loss of profit, because that would be paying money into the hands of companies which would be available for private shareholders; and therefore any consequential damage should stop short of awarding consequential damage related to profits or gains. I confess I am quite unable to understand that argument, unless it be jealousy of the National Coal Board at paying profits which it has shown itself so far quite unable to make itself.

Then it is said: it would be very difficult to assess damages for loss of profits and goodwill; there would be an unknown and large number of claims, great difficulty in finding out whether they were justified, and in a heavily built-up industrial area like this it might indeed be almost impossible, commercially, at any rate, in the Deep Pit Area, to work the coal at all, and it would in effect be sterilised.

I look upon the matter in this way: first of all, I have to be satisfied under section 6 (1) whether it is in the national interests that a right of mining should be granted. The answer to that I gave at the beginning of this judgment: it is plainly yes. I then have to see on what terms this right, the right to let down, should be granted; and for that I turn to section 6 (5), which provides that I must have regard to all the circumstances of the case, " and (so far as relevant) to the royalties, " covenants, and conditions reserved by or contained in the " applicant's existing mining lease or leases (if any), or customary " in mining leases in the district."

It is, of course, common ground, for the reasons I have already given, that there are no such mining leases, because they were all void, so far as relevant to this application; and I go further, and I say I do not think, even if there had been some mining leases available in the district, that they would have any relevance for the purpose that I have to consider. A mining lease essentially gives a right to get coal, and royalties are to be paid for it; quite different considerations may come into play when you are considering what it is right to insert as compensation for damage due to subsidence. I agree, of course, that in some cases it may be that the surface owner is different from the person granting the mineral right; but in many cases he will not be. I have quite a different case to consider.

The National Coal Board, as successors to the Coal Commission, own the minerals. All they want is a right to let down, and that is the right for which they have to pay. I cannot see any answer to the objectors' claim. Why should they be expropriated and have part of their valuable rights confiscated without compensation? I do not see how the court could properly make such an order unless the Act clearly imposed upon the court an obligation so to do; and it is quite clear that it imposes no such obligation.

But even if I accede to the argument to regard this question of compensation as all part of the national interest, I cannot see that it is in the national interest that the owners of the surface above the application lands should have their property expropriated for the general benefit of the public at large. It seems to me right that the public at large should pay through the medium of the National Coal Board full and proper compensation for the rights of which the objectors are being deprived.

Accordingly, it seems to me that the order for which the objectors are asking, that is to say, substantially the order of 1952, subject to the amendments which I shall consider in a moment, must be made.

I only desire to add this: if I am wrong and if this is to be regarded as a question of compensation under subsection (2) of section 6, thereby bringing section 9 into play, it is a claim for which the objectors have an a fortiori case, for they would have to consider what would be termed reasonable between a willing grantor and a willing grantee; and why a willing grantor should be prepared to surrender his property, or part of it, without payment, I do not understand.

I pass, then, to certain subsidiary points. The first relates to sewers. The Corporations of Newcastle-under-Lyme and Stoke-on-Trent are the sewerage authorities for their respective areas, and they have a large number of sewers embedded just under the surface of the application lands. It is inevitable that during mining there will be subsidence, and no doubt cracks will appear, damage may be done, and the question is, what provision should be inserted in the order as to that.

In 1947 it was decided by the Court of Appeal in *Newcastle-under-Lyme Corporation* v. *Wolstanton Ltd.*[5] that public authorities have no rights to support of the sewers vested in them unless they also own the surface of the land.

Therefore, the position down to the Act of 1957 was that these public authorities had no right to support for their sewers, and therefore the National Coal Board could work without paying any compensation; but under the Act of 1957 they were given the right to claim for damages to their sewers, but not for consequential damage. The National Coal Board contend, therefore, that unless they prove in any particular case that they are the owners of the surface, they should be left to their statutory rights under the Coal-Mining (Subsidence) Act, 1957.

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[5] [1947] Ch. 427; 63 T.L.R. 162; [1947] 1 All E.R. 218.

The corporations, however, say that they have given up a good deal in connection with the many public buildings which they own or for which they are responsible, and, to use modern political parlance, the whole thing should be treated as a "packet" agreement, and they should be allowed this extra consequential damage as a term of consenting to the order or at any rate withdrawing their opposition and entering into some agreement.

The short answer to that seems to me that they have not in fact entered into an agreement which deals with the question of these sewers. It seems to me plain that they should have full and fair compensation, no more and no less. It does not seem to me that they have any rights in respect of these sewers for which they are to be compensated, and therefore to that extent I am proposing to put in something to the effect of the last four lines of paragraph 5 of the proposed Minutes of the National Coal Board.

There are one or two other matters which also remain to be considered.

Certain of the objectors own land partly in and partly without the application lands. They submit that they should be entitled to have consequential damage in respect of that part of their factory which is outside the application land as well as in respect of that part which is within it.

It seems to me that exactly the same principles apply in this case as in those of the sewers. In neither case that I have mentioned was any agreement made. They must, therefore, be compensated fairly and fully—not too little and not too much. In respect of such part of a factory as is outside the application lands, they have no locus standi and therefore get no compensation; in principle in respect of such outside land they are in the same position legally as those objectors whose land is wholly outside the application lands, and with that class of objector I now deal.

It remains only to deal with the class of objector who is wholly outside the application lands.

The evidence was that through these deep workings going down ultimately perhaps to 4,000 ft., the subsidence will be less, but it may be over a greater area; one mining expert has estimated that the surface will be affected perhaps up to 520 yards outside the area of the application land.

It is submitted on behalf of a number of these persons, all of whom are completely outside and yet within 520 yards, that some provision should be made for their benefit to ensure that they have some rights as to consequential damage.

But I accept the submission of Sir Andrew Clark on this point. It seems to me that persons who are wholly outside the area have no locus standi under this Act. They may indeed be able to make some bargain, and that was done by one of the objectors, the Michelin Tyre Company, but that is an agreement which is wholly outside the order which I propose to make. The National Coal Board is not asking to work any minerals under these persons' lands. Secondly, they are not asking to let down their land. They are only asking for liberty to let down the land within the application lands. If anyone outside that area has a right of support from adjacent lands and can prove their title to that, they can, of course, obtain an injunction against the National Coal Board to prevent them working, it matters not where, so as to disturb their rights. If they have no such right, then they will not get an injunction.

It seems to me that nothing in any order that I make can affect the position at law of those who are wholly outside, because my order does not affect that land at all. It is perfectly true in respect of the order of 1952 in *In re Wolstanton Ltd.'s Application* [5a] Danckwerts J., during the course of his judgment, made an order dealing with a school outside the area, but, reading the judgment as a whole, it is plain that he was only dealing with the matter as part of some general agreement which had been reached between the National Coal Board and the Staffordshire County Council, who were the owners of a number of schools in the area; and it is clear that the point which I have had to consider was not before him at all.

There is, therefore, nothing in that authority which either helps or hinders me from coming to the conclusions to which I have come, namely, that they have no locus standi in the matter.

That covers all the matters of principle and I propose to stand this matter over for one month until July 9, by which time I hope that the parties will have been able to agree. One or two agreements have not yet been finalised. I hope they will then come before me with an order on every part of which they are all agreed, consistently, of course, with the judgment I have just delivered. I will now hear arguments about costs.

[5a] [1952] Ch. 519.

Argument was then addressed to the court on the question of costs.

Sir Andrew Clark Q.C. Relief under the Act of 1923 can only be granted when the court is satisfied that it is in the national interest; since what is being done, except when an application is wholly refused, is something in the national interest, it would be wrong to saddle with costs those who are applying for something in the national interest. The objectors have legal rights which are, or may be, adversely affected, and it would be wrong to saddle them with the payment of the applicants' costs; therefore the fair balance between the two is to make no order as to costs.

The Railway and Canal Commission (who formerly exercised this jurisdiction) adopted a practice of making no order as to costs. That point was fully argued in *In re New Hucknall Colliery Co. Ltd.*,[6] where Sankey J. said [7] that, although the court had power to award costs, it would only be done in a very exceptional case. There was nothing in the Railway and Canal Commission (Abolition) Act, 1949, to alter this practice; and when the question came before Danckwerts J. in *In re Wolstanton Ltd.'s Application*[8] he decided that the existing practice should not be disturbed. The judge had, of course, a complete discretion, and he was not laying down any hard and fast rule; he could not do so because nothing could take away the general discretion of the judge in respect of costs: R.S.C., Ord. 65, r. 1.

To award costs against the board would be encouraging people to lodge objections and cause delay. In any particular case of hardship the court can always make an order granting costs. The advantages of the rule are that it discourages frivolous objections and encourages minor interests to join together. There are here no special grounds or circumstances which make it desirable to depart from the old practice; and if the existing practice is not regarded at all, and it is considered de novo, the proper exercise of the jurisdiction would be to make no order as to costs.

Arnold Q.C. There is no established practice which the court is bound to follow because some other judge has adopted it. The question of costs is always a matter of judicial discretion upon which there can be no hard and fast rule: see *The Friederberg*[9] and *The Young Sid.*[10]

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[6] (1925) 41 T.L.R. 383.

[7] Ibid. 384.

[8] [1952] Ch. 519.

This is not a case in which the objectors have committed any sort of outrage; they have substantially succeeded and should have their costs, or some part of their costs.

Russell Q.C. My clients have won an important victory on the question of compensation. If in those circumstances the court should think it right that the National Coal Board should pay the objectors' costs, the discretion of the court is in no way fettered by the judgment of Danckwerts J. in the *Wolstanton* case.[11] The attitude of the board was that it was de minimis, and we had to be prepared for cross-examination; that attitude shifted during the hearing and cross-examination was not needed.

Stewart-Brown Q.C. The ordinary rules of the Chancery Division apply to these cases: see notes to Order 65, r. 1, in the Annual Practice, 1959. In the *Naylor Benzon* case[12] no order was made as to costs; according to the report in the All England Law Reports the parties did not ask for them. The court is not bound by anything said by Danckwerts J. in *In re Wolstanton Ltd.'s Application,*[13] because he was not deciding anything as a matter of law. Roxburgh J. in *In re National Coal Board's Application* (*Second Bulwell Application*)[14] said that Danckwerts J. had not laid down any rule, and that, if he had, it was not a rule which bound him (Roxburgh J.). Danckwerts J. had no jurisdiction to lay down a rule which any subsequent judge had to follow; he was dealing with it as a matter of practice and discretion. One court cannot be bound by the exercise of a discretion by another court in a particular manner. There is, accordingly, no settled practice, and Order 65, r. 1, applies and the costs are in the discretion of the court.

Grant. If the court is minded to award costs to private individuals, no distinction should be drawn because certain objectors are public authorities.

Griffith. As regards objectors outside the application area, their position was not clarified until judgment was given; as regards those partly in and partly outside the application land, they have been substantially successful.

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[9] (1885) 10 P.D. 112.

[10] [1929] P. 190; 45 T.L.R. 389.

[11] [1952] Ch. 519.

[12] [1950] Ch. 567; 66 T.L.R. (Pt. 1) 418; [1950] 1 All E.R. 518.

[13] [1952] Ch. 519.

[14] Unreported, June 22, 1955.

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Sparrow. So far as the outsiders are concerned, they did nothing vexatious. Their position was not clear until judgment. There is an authority on costs in the Companies Court, where Wynn-Parry J. considered an apparent rule of practice and disregarded it: *In re R. W. Sharman Ltd.*[15]

Browne. All objectors should be treated in the same way as regards the question of costs.

June 12. UPJOHN J. I have now to consider the question of the costs of this application, which has been fully argued before me.

It is quite plain, having regard to section 10 (1) (*c*) of the Mines (Working Facilities and Support) Act, 1923, that the Railway and Canal Commission had a full discretion with regard to costs. However, they did in fact adopt a rule of convenience in normal cases as appears from *In re New Hucknall Colliery Ltd.*,[16] where Sankey J., delivering the judgment of the court, said [17]: "I think we have power to give costs, but I also agree with "him"—that is Mr. Turner—"that it must be a very exceptional case in which we do give costs, and although I do not "wish in any way to be a prophet or in any way to bind either "ourselves or our successors, I too think that the occasions on "which we do give costs will probably be very rare occasions." The judge then went on to say that that was in fact one of those very rare occasions, and he ordered an objector to pay the costs.

The Railway and Canal Commission was abolished in 1949, and the jurisdiction transferred to this court. Order 54o deals with the jurisdiction conferred upon this court. By rule 12 it is provided: "The ordinary practice and rules of the Chancery "Division so far as they are not inconsistent with this order "shall apply to proceedings under this order." So far as costs are concerned, therefore, that directs one straight to Order 65, r. 1; and it is plain that this court has a complete discretion as to awarding costs in cases under the Act, and that indeed is not disputed.

A number of orders have been made, but in only one of them so far as I am aware has there been any judicial discretion exercised or decision upon the matter, and that is the National Coal Board's application in 1952 in the *Wolstanton* case [18] which I discussed fully in my main judgment. There it was argued, apparently, by the Coal Board that the practice of the Railway and Canal Commission in not granting costs should be followed; and Danckwerts J. said [19]: "On the question of "costs it was suggested by counsel on behalf of the applicant "that the practice of the Railway and Canal Commission in not "granting costs (as a general rule) be followed, although he "(His Lordship) had full discretion in the matter. Certain "objectors submitted that they ought to be granted costs. The "jurisdiction which he had seemed to him to be sui generis and "was not to be compared with any of the other jurisdictions "of the Chancery Division. The rule normally would be that "costs should not be awarded, and he proposed to abide by that "rule in the present case." I am not quite clear whether the judge was attempting to lay down a rule or not. That matter was discussed in *In re National Coal Board's Application* (*Second Bulwell Application*) [20] before Roxburgh J. on June 22, 1955, when, in the course of what I think was an extemporary judgment, having cited the passage I have just read, the judge said this: "I am not quite sure whether he means that "somebody else had laid down a rule which he proposed to "follow or that he was tentatively suggesting that he was laying "down a rule. But I will not believe that he was intending "formally to lay down a rule. First of all, I am not clear what "jurisdiction he has got to lay down that rule. He has, of "course, every possible jurisdiction to decide the case before "him, but if I remember rightly, though it has not been fully "explored before me, my duties in regard to costs are dealt "with by statute." However, in the result it became unnecessary for Roxburgh J. to come to any conclusion upon the matter.

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[15] [1957] 1 W.L.R. 774; [1957] 1 All E.R. 737.

[16] 41 T.L.R. 383.

[17] Ibid. 384.

With great respect to Danckwerts J., if he was attempting to lay down any normal rule, he did so per incuriam, and I do not think he would have done so had his attention been drawn to the authorities which have been cited to me. I refer in particular to *The Friederberg* [21] and *The Young Sid.* [22] I will cite only a passage from the last mentioned case, from the judgment of Sankey L.J. He said [23]: "If those are correct statements "as to the practice in the Admiralty Court, they do not convey "to my mind that there is a hard and fast rule upon the subject

[18] [1952] Ch. 519.
[19] [1952] 1 All E.R. 679.
[20] Unreported, June 22, 1955.
[21] 10 P.D. 112.
[22] [1929] P. 190.
[23] Ibid. 201.

"which can be treated as a rule of practice. If there were I "think it would be wrong. Personally I rather think it is a "list of instances in which the court has or has not given costs "in the particular case, which may serve as a guide to a court "trying subsequent cases, but which is not binding upon such "a court. To begin with, if there were such a hard and fast "rule, it would contravene Ord. LXV, r. 1, as to costs, which "has statutory authority, and which expressly provides that the "costs shall be in the discretion of the court or judge."

A number of orders have been made by this court since the transfer of the jurisdiction in 1949, but, as I have said, in none of them has the question of costs been argued except in the one case I have mentioned. In my view it is not proper to express today any judicial view as to whether ultimately a settled practice will or will not emerge. That can be seen only in the future as and when more cases are decided by this court.

I propose, therefore, to consider this case solely as a matter of discretion on its own particular facts without attempting to lay down any general or normal rule, or anything of that nature.

I am not going to review the facts here at any length. The matter started in this way. In their application the National Coal Board were seeking to let down particularly in the Deep Pit Area without any restriction on method of working, and with no other restrictions as to leaving support or providing for packing at all. As they stated in the application: "They accordingly "request that the rights applied for should be granted subject "to no restrictions other than that they should work the described "minerals in this area in skilful and workmanlike manner by "such methods and to such extent as they consider to be "suitable to the conditions prevailing and necessary to preserve "the unimpeded functioning of manufactories and public utility "undertakings on the surface." The same request was expressed in relation to other areas.

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A claim to such wide and unfettered powers of working and letting down without any restriction was calculated to bring energetic objection from the mildest and most unlitigious of surface owners, and it is not in the least surprising that there was this large number of objectors. Ultimately agreement was reached which in fact made it unnecessary for me to go into the question of working or to hear any of the many witnesses cross-examined. But that the Coal Board had to make valuable concessions is shown by their proposed minutes of order, where they have given an undertaking that the roof shall be supported with not less than 50 per cent. of packing; that the void or waste shall not exceed 10 yards, and: "that the interval to be "allowed to lapse between the termination of the working of any "seam in any area and the commencement of the working of "any overlying or underlying seam in the same area shall be "not less than three years." No doubt there had been substantial argument whether the period should be three years or five years. Not only that, but a number of agreements have been reached which give valuable protection to particular local authorities and large firms and companies engaged in trade on the super-adjacent land, and a number of important matters of law have had to be decided.

I will make it plain at once that in making the order I am going to make I do not in the least do so on the footing or because the National Coal Board has failed on the main point as to fair compensation. My decision on that point is to the benefit of the board and the public, and will form guidance in future cases unless indeed my judgment is damaged seriously by being "let down" in the Court of Appeal.

Other matters of importance were decided by my judgment all in fact in favour of the National Coal Board. It decided whether outside owners had any locus standi; and the rights of those who have works partly within and partly without the area. I also decided matters in relation to questions of support for sewers and pipes; all those are matters of importance, particularly to the National Coal Board and to those who have the misfortune to sit above valuable coal seams. But it is particularly to the benefit of the National Coal Board, it seems to me, that the objectors' behaviour has been extremely reasonable in this case, and they have not incurred unnecessary expense. All they have done is to protect their rights. In the particular circumstances of this particular case I propose to order the National Coal Board to pay the costs themselves, as between party and party, of the objectors who appear before me.

The only other effective order I shall make today is that the matter will stand over until July 9. But I want to make this quite clear; the provision as to costs which will go into the order to be made on that day will operate as of July 9 so that objectors will be entitled to their proper costs incurred between today and July 9.

Order accordingly.
Costs to be paid by the applicants.

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NATIONAL COAL BOARD'S APPLICATION, *In re.*

Solicitors: *Donald H. Haslam for F. W. Dawson, Dudley; Sherwood & Co. for Knight & Sons, Newcastle-under-Lyme; Wedlake, Letts & Birds; Cunliffe & Mossman; Wedlake, Letts & Birds for Kent, Jones & Done, Alsager, Stoke-on-Trent, and Moxons, Stoke-on-Trent; Sharpe, Pritchard & Co.; Kennedys; Cunliffe & Mossman for Knight & Sons, Newcastle-under-Lyme; Doyle, Devonshire & Co.; Kingsford, Dorman & Co.; William Usher; Gibson & Weldon; M. J. B. Gilmour.*

I. G. R. M.

C. A.

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Oct. 8, 9, 12.

Lord Evershed M.R., Sellers and Harman L.JJ.

In re ENDACOTT, DECD. CORPE *v.* ENDACOTT.

[1958 E. No. 1606.]

Charity — Public — Bequest to parish council — "For the purpose of "providing some useful memorial to myself" — Whether valid charitable trust.

Trust and Trustee—Possibility of execution by court—Trust for benefit only of objects—Memorial.

Local Government—Powers—Parish council—Power to accept gift for "any local public purpose" — Whether activities charitable — Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 268 — *Physical Training and Recreation Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 46), *s.* 4—*Recreational Charities Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 17), *s.* 1.

A testator gave his residuary estate to the North Tawton Parish Council "for the purpose of providing some useful memorial to "myself." Danckwerts J. held that the gift failed. On appeal:—

Held, dismissing the appeal, (1) that, as a matter of construction, the bequest was not an out-and-out bequest to the parish council; the words "for the purpose of providing some useful "memorial to myself" imposed an obligation in the nature of a trust.

(2) That the nature of a parish council's activities was not so clearly defined as being of a charitable character as to impose a charitable limitation on the words of the gift and that the power of a local authority under section 268 of the Local Government Act, 1933, to accept a gift for "any local public purpose" was not, in its context, confined to charitable purposes, nor were the powers of local authorities under section 4 (1) of the Physical Training and Recreation Act, 1937, by section 1 of the Recreational Charities Act, 1958, limited to charitable activities.

Houston v. *Burns* [1918] A.C. 337; 34 T.L.R. 219 considered.

In re Garrard [1907] 1 Ch. 382; 23 T.L.R. 256; *In re Flinn* [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541; *In re Rumball, decd.* [1956] Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71 distinguished.

(3) That this trust did not fall within the "anomalous" class of trusts of a public character which, although not charitable, were nevertheless trusts which the court could efficiently, and would, enforce, and that, accordingly, though the gift was specific, in the sense that it indicated a purpose capable of expression, it was of too wide and uncertain a nature to qualify as an enforceable trust.

In re Drummond [1914] 2 Ch. 90; 30 T.L.R. 429; *In re Astor's Settlement Trusts* [1952] Ch. 534; [1952] 1 T.L.R. 1003; [1952] 1 All E.R. 1067; and *Leahy* v. *Attorney-General for New South Wales* [1959] A.C. 457; [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300 considered.

(4) That the gift was not limited to the provision of a memorial "useful" to the inhabitants of North Tawton and further that the formula of gift was not equivalent to "for the benefit of the "inhabitants of North Tawton."

Williams' Trustees v. *Inland Revenue Commissioners* [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513; 27 T.C. 409 considered.

Semble that the proposition that non-charitable trusts for public purposes, which fail as trusts, may survive as powers, is not one which can be treated as accepted in English law.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

The testator, Albert George Endacott, by his will dated January 2, 1952, after appointing the plaintiff, Thomas Denner Corpe, to be his executor, and making certain bequests, provided: "Everything else I leave to North Tawton Devon Parish Council "for the purpose of providing some useful memorial to myself "subject to the proviso that if my wife outlives me they must "during the lifetime of my wife pay to my wife the interest "which may accrue on the capital when properly invested by "them."

The testator died on June 18, 1958. The value of his residuary estate was approximately £20,000.

By this summons the plaintiffs asked whether the gift to the North Tawton Parish Council was valid or failed for uncertainty or otherwise. The defendants to the summons were the parish council, the testator's widow and son as his next-of-kin, and the Attorney-General.

Danckwerts J. held that the trust failed for uncertainty.

The parish council appealed.

J. L. Arnold Q.C. and *C. A. Settle* for the North Tawton Parish Council. Danckwerts J. was wrong in holding that the gift to this parish council is void. This gift is an immediate out-and-out gift and the rule against perpetuities does not apply to it. It is within the class of gifts considered in *In re Clarke*,[1] *In re Drummond*[2] and *In re Cole*.[3] On the true construction of this gift it is an out-and-out gift to the parish council. The words "for the purpose of providing some useful memorial to myself" do not impose any trust but merely explain the reason for the gift. The council takes absolutely and can apply the gift for any purpose of the council. If that is not the true construction, the question arises whether the gift is not saved by reason of the charitable character of the council itself. The activities of the council are all statutory and are all charitable. Section 268 of the Local Government Act, 1933, confers on a parish council power to accept gifts for "any local public purpose or for the "benefit of the inhabitants." Such gifts are valid charitable gifts. Alternatively, the gift may fall into that class of trusts for non-charitable purposes which, though not charitable, will nevertheless be enforced by the courts. Such trusts were considered in *In re Astor's Settlement Trusts*.[4] The principle of that case was applied by Roxburgh J. in *In re Catherall*,[5] where he held that a gift to be used for a "suitable" memorial was valid. That case is indistinguishable from the present case. There is no uncertainty here as to the trusts. It is one which the court could enforce. [Reference was made to *In re Shaw, decd.*[6]] It appears from passages in Mr. J. H. C. Morris and Professor Barton Leach's book on The Rule Against Perpetuities (pp. 305–308) that a gift for a purpose which does not infringe the rule against perpetuities may be valid. The fact that this is a residuary gift is not material. The next-of-kin are in the same position as the residuary legatees where the gift is a legacy: *In re Cole*.[7]

For a gift to be supported on the principle of the *Astor* case[8] the trust must be for a specific purpose. If the principle to be applied is there stated correctly, the only ground on which this gift will fail is that it is not sufficiently specific. In *In re*

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[1] [1901] 2 Ch. 110; 17 T.L.R. 479.

[2] [1914] 2 Ch. 90.

[3] [1958] Ch. 877; [1958] 3 W.L.R. 447; [1958] 3 All E.R. 102.

[4] [1952] Ch. 534; [1952] 1 T.L.R. 1003; [1952] 1 All E.R. 1067.

[5] Unreported—1958 C. No. 2676.

[6] [1957] 1 W.L.R. 729; [1957] 1 All E.R. 745.

[7] [1958] Ch. 877.

[8] [1952] Ch. 534.

Catherall[9] that test was applied and it was held that the gift was sufficiently specific. Roxburgh J. held there that the court can say whether a memorial is "suitable." If that is so, it can say whether it is "useful."

The Court of Appeal cannot now well say that *In re Clarke*[10] and *In re Drummond*[11] were not rightly decided. Both were cases of trusts for immediate expenditure. *Gibson* v. *South American Stores (Gath & Chaves) Ltd.*[12] is an example of anomalous trusts. The distinction between the cases is that in one the object of the trust is not designated. In the other it is and the trustees are given powers to achieve it. There is no authority on this point other than *In re Catherall*,[13] and the court is asked to say that that decision was right.

The persons concerned to see that the trust is carried out are either the next-of-kin or the Attorney-General, who can move his own motion to enforce public rights. His position is different from that in the case of a charitable trust where he acts on behalf of the Crown as parens patriae. If the council give an undertaking to administer this trust, the court could enforce the undertaking: *Pettingall* v. *Pettingall.*[14] If the principle that this is a valid trust is accepted, the machinery for enforcing it will present no difficulties.

If this trust is not enforceable as a non-charitable trust, it is submitted that on the true construction of the gift a valid charitable trust is created. The question is whether the personality of the trustee affects the scope of the gift so as to limit the trusts to charitable trusts. Under section 268 of the Local Government Act, 1933, a parish council can hold a gift for charitable purposes. The testator must be assumed to know the law and that a parish council is concerned with charitable trusts and by its constitution cannot act as trustee except of charitable trusts. The council can under section 4 of the Physical Training and Recreation Act, 1937, acquire land for recreational purposes. Under the Recreational Charities Act, 1958, such trusts are charitable trusts. [Reference was made to *Inland Revenue Commissioners* v. *Baddeley.*[15]]

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[9] Unreported—1958 C. No. 2676.

[10] [1901] 2 Ch. 110.

[11] [1914] 2 Ch. 90.

[12] [1949] Ch. 572; 65 T.L.R. 370; [1949] 2 All E.R. 18; on appeal [1950] Ch. 177; 66 T.L.R. (Pt. 1) 83; [1949] 2 All E.R. 985.

[13] Unreported—1958 C. No. 2676.

[14] (1842) 11 L.J.Ch. 176.

[15] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525; 35 T.C. 661.

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In the context of this will the court should say that the character of the trustee informs the trust so as to limit the trust to charity on the principle of *In re Garrard*,[16] *In re Davidson*,[17] *Dunne* v. *Byrne*[18] and *In re Bain*.[19] The fact that the trustee is a parish council is the centre feature of the case. *Farley* v. *Westminster Bank*[20] is in point and is relied on to show that the ambit of the gift is limited to work within the powers of the council. [*In re Flinn*,[21] *In re Spensley's Will Trusts*[22] and *In re Rumball, decd.*[23] were referred to.]

There are three possible views of the effect of the words added to this gift. (1) They specify the object which the testator trusted the council to carry out, and, if that is right, the case falls within the *Astor*[24] principle and the court is asked to accept an undertaking to give effect to that object; (2) the testator has not specified the objects which he has entrusted the council to carry out, and the trusts are determined by the powers of the council; (3) the superadded words merely show the motive for the gift and the council takes absolutely.

Lastly, it is submitted that, if there is any doubt here, the court should uphold the validity of the gift rather than hold that the testator died intestate.

Denys Buckley for the Attorney-General. The Attorney-General supports the contention that this is a charitable trust. It is true that the Attorney-General is responsible for looking after all public rights. He will intervene where highways are obstructed and also to enforce other public rights arising under statute. It is not clear that he would intervene in the *Astor*[24] type of case. The question is rather whether the hen or the egg comes first. The question is whether proceedings under the Crown Proceedings Act, 1947, would lie for breach of trust if the validity of the trust depended on whether the Attorney-General would enforce it. No authority is known for the intervention of the Attorney-General where the gift was not absolute.

Here the testator has attempted to state the trusts on which his residue is to be held. The memorial is to be a "useful" one. He must have meant useful for the inhabitants of this parish. That is a trust for the benefit of the inhabitants and charitable. There is no uncertainty. The court would have no difficulty in deciding whether a proposed memorial was "useful." This is a good charitable trust. [Reference was made to *Goodman* v. *Mayor of Saltash*[25] and *Williams' Trustees* v. *Inland Revenue Commissioners*.[26]] What is "useful" is for the benefit of the inhabitants of this parish.

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[16] [1907] 1 Ch. 382; 23 T.L.R. 256.

[17] [1909] 1 Ch. 567; 24 T.L.R. 760.

[18] [1912] A.C. 407; 28 T.L.R. 257.

[19] [1930] 1 Ch. 224; 45 T.L.R. 617.

[20] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.

[21] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.

[22] [1954] Ch. 233; [1954] 2 W.L.R. 145; [1954] 1 All E.R. 178.

[23] [1956] Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71.

[24] [1952] Ch. 534.

Michael Albery Q.C. and *Oliver Lodge* for the next-of-kin. With regard first to the submission that this is a valid charitable trust: there are at least two sets of statutory provisions which confer on this council powers which are not charitable: section 4 of the Physical Training and Recreation Act, 1937, confers powers wider than those which are made charitable by section 1 (1) of the Recreational Charities Act, 1958. This subsection is qualified by the provisions of subsection (2). Providing for recreation is not itself a charitable purpose: *Inland Revenue Commissioners* v. *Baddeley*.[27]

Secondly, section 268 (1) of the Local Government Act, 1933, authorises a parish council to accept the trusteeship of gifts, even though they are not charitable gifts, if the gift is for a local public purpose; such purposes are not necessarily charitable: *Blair* v. *Duncan*[28]; *Houston* v. *Burns*.[29] If it can be shown that any of the activities of the council are not charitable activities, this gift is not charitable by reason of the character of the trustee. [They were stopped on the question of charitable trusts.] If not charitable, the trusts fail, first, on the principle of *In re Astor's Settlement Trusts*,[30] because there is no one to enforce them, and, secondly, they fail for uncertainty. [Reference was made to *In re Shaw, decd.*[31] and *In re Diplock*.[32]] Some of the decided cases on this subject may have to be regarded as anomalous or wrong.

[HARMAN L.J. Lord Greene M.R. in *In re Compton*[33] said that the anomalous cases should not be treated as part of the law and should not be followed. This sort of case may be another example of such anomaly.]

That is so. Where the trustee has a discretion to select "useful purposes," the trust is like the "charitable and benevolent" cases, and, even if the Court of Appeal accepted as correct the statement in the American Law Institute's Restatement of Trusts set out in Morris and Leach's Rule Against Perpetuities (p. 308), it would not cover this case, which is also affected by uncertainty. This gift further fails because the testator has left it to someone else to make a will for him. There are two aspects of uncertainty. First, a gift will be uncertain unless it is possible to know in advance whether a purpose is within the prescribed class, and, secondly, it is not permissible to delegate the testamentary power. [Reference was made to *Chichester Diocesan Fund and Board of Finance* v. *Simpson.*[34]] " Useful " purposes are not necessarily charitable. The court must be able to execute the trust if the trustees fail to do so. Here it would be impossible to say sufficiently precisely what is a " useful purpose." *In re Drummond* [35] and *In re Clarke* [36] may be explicable because the property was given to unincorporated associations whose members were capable of determining the trusts. The members might not have taken the property individually but they had rights which were enforceable through trustees. If the trusts in this case are not charitable, they must fail on the principle in *In re Astor's Settlement Trusts*,[37] *In re Wood, decd.*[38] and *In re Shaw, decd.*,[39] supported by *Inland Revenue Commissioners* v. *Broadway Cottages Trust*,[40] and the property should go to the next-of-kin.

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[25] (1882) 7 App.Cas. 633.

[26] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513; 27 T.C. 409.

[27] [1955] A.C. 572.

[28] [1902] A.C. 37; 18 T.L.R. 194.

[29] [1918] A.C. 337; 34 T.L.R. 219.

[30] [1952] Ch. 534.

[31] [1957] 1 W.L.R. 729, 734; [1957] 1 All E.R. 745.

[32] [1941] Ch. 253; 57 T.L.R. 263; [1941] 1 All E.R. 93.

[33] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.

B. S. Tatham for the plaintiff executor.

J. L. Arnold Q.C. in reply. Where the donee is a person chosen by reference to a particular office, the trusts will be interpreted by reference to the powers of that office. It would be hard if this gift were excluded by *In re Astor's Settlement Trusts* [41] because it was too vague and outside the *In re Rumball, decd.*[42] principle because it were not vague enough. The question whether these purposes are charitable turns on section 4 of the Physical Training Act of 1937. There must be a plain expression of purposes in terms not confined to legal charitable purposes to escape from the effect of the donee being the holder of an office and described as such. In *In re Astor's Settlement Trusts* [43] Roxburgh J. said that *In re Drummond* [44] was a different class

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[34] [1944] A.C. 341, 349, 371; 60 T.L.R. 492; [1944] 2 All E.R. 60.

[35] [1914] 2 Ch. 90.

[36] [1901] 2 Ch. 110.

[37] [1952] Ch. 534.

[38] [1949] Ch. 498; [1949] 1 All E.R. 1100.

[39] [1957] 1 W.L.R. 729.

[40] [1955] Ch. 20; [1954] 3 W.L.R. 438; [1954] 3 All E.R. 120.

[41] [1952] Ch. 534.

[42] [1956] Ch. 105.

[43] [1952] Ch. 534.

[44] [1914] 2 Ch. 90.

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of case from *In re Price*,[45] but he did not say what the difference was. *In re Clarke*[46] may be explicable on the ground that there was no trust at all; that ground, however, was negatived by Eve J. Cases such as *In re Thompson*[47] are irreconcilable with *In re Drummond*.[48] It is not right to say that the test is that the court must be able to execute the trust. The court must be able to say whether the trustees are spending money on an extraneous object. [Reference was made to *In re Dean's Will Trusts*.[49]] *In re Drummond*[50] was criticised in *Leahy* v. *Attorney-General for New South Wales*,[51] but not on the ground now put forward. *In re Thompson*[52] does not appear to have been criticised at all. It was an "*Astor*" type of case. It was contended by the next-of-kin that the rationalisation of *In re Drummond*[53] and *In re Clarke*[54] was that in those cases there were individuals who could benefit and were, therefore, capable of complaining of deviations, but Roxburgh J. in *In re Astor's Settlement Trusts*[55] assimilated *In re Clarke*[56] to *In re Price*,[57] where that does not hold good.

LORD EVERSHED M.R. By his will dated January 2, 1952, the testator, Albert George Endacott, who died in June, 1958, first of all made an appointment of a firm of solicitors as executors and then gave to his son certain buildings and premises comprising a factory, subject to a mortgage, together with certain chattels. He concluded his will by the following residuary gift: "Everything else I leave to North Tawton Devon Parish Council "for the purpose of providing some useful memorial to myself "subject to the proviso that if my wife outlives me they must "during the lifetime of my wife pay to my wife the interest "which may accrue on the capital when properly invested by "them."

The question before the court has been whether that residuary gift to the North Tawton Parish Council can take effect. Danckwerts J. answered that question negatively. He concluded his judgment, according to the short note of it: "It is argued "that the words 'for the purpose of providing some useful

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[45] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.
[46] [1901] 2 Ch. 110.
[47] [1934] Ch. 342.
[48] [1914] 2 Ch. 90.
[49] (1889) 41 Ch.D. 552.
[50] [1914] 2 Ch. 90.
[51] [1959] A.C. 457; [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300.
[52] [1934] Ch. 342.
[53] [1914] 2 Ch. 90.
[54] [1901] 2 Ch. 110.
[55] [1952] Ch. 534.
[56] [1901] 2 Ch. 110.
[57] [1943] Ch. 422.

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"'memorial to myself' are 'limiting words.' I think they are "very wide words which may well include non-charitable pur"poses. The nature of the trust would limit those wider purposes "if the parish council's argument prevailed. I declare that the "gift fails for uncertainty." That short statement comprehends the various arguments that have been put forward, and the conclusion is one with which I entirely agree.

Mr. Arnold, for the parish council, has put his case on two broad distinct grounds. He has first said that the words "for "the purpose of providing some useful memorial to myself" merely indicated the reason why the testator had made this gift, but did not, and were not intended to, impose any obligation upon the parish council, with the result that the gift should be treated as a gift out and out to the parish council.

Alternatively, Mr. Arnold has argued on the footing that the words (contrary to his first contention) do impose a trust or obligation of some kind, though it is to be noted that it has not been suggested that such a trust would offend the rule against perpetuities. But, on this alternative basis, the argument has diverged thus: First, if the trust be not (upon its true interpretation) a charitable trust, still it is said to be of a public nature and valid and effective, on the ground that it falls within a class of cases which have been referred to as "anomalous," and which were recited by Roxburgh J. conveniently in his recent decision in the case of *In re Astor's Settlement Trusts.*[1] The contention is that this case, falling within that so-called anomalous class, must be treated as effective, being of a public character and being also such that, by appropriate machinery, it can be properly controlled by the court. It may perhaps be added that, since the gift was one of residue, then, if the gift fails, an intestacy follows; and it is, of course, a fair comment to make that in a case of any kind, where intestacy follows a particular result, the court will at least think carefully before arriving at such a conclusion.

Then, alternatively, it is said the trusts are in truth charitable, and the argument on this alternative again diverges. First of all, it has been submitted that a parish council (and, of course, this particular parish council) is, according to its statutory constitution, limited, at any rate quoad any gifts of this kind which it receives, to charitable functions and activities. If that is right, then it is said that the gift to such a body stamps (and, if necessary, qualifies) the nature of the trusts which are declared, and that they should, accordingly, be taken as being and intended to be within the scope of the (charitable) statutory activities or powers. Secondly (and this was a point particularly put to us by Mr. Buckley for the Attorney-General), it is said that, whether the parish council be or be not a body confined in activity to charitable purposes, the true view of the meaning of these vital words "for the purpose of providing some useful "memorial to myself" is that they are, as a matter of language, equivalent to a trust for the benefit of the local inhabitants of North Tawton Parish and therefore, according to authority, charitable.

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[1] [1952] Ch. 534; [1952] 1 T.L.R. 1003; [1952] 1 All E.R. 1067.

Those, broadly, are the contentions; and I will deal at once and briefly with the first point, namely: Was the language which I have quoted intended to impose an obligation, or was it merely expository? That matter I can deal with briefly, because it is, after all, a matter of mere construction. It will, therefore, be convenient if I state at once what my view is of the meaning of these words "for the purpose of providing "some useful memorial to myself"; and I say, like Danckwerts J., that I do not think that these words were merely expository. In my judgment, they were intended to impose an obligation in the nature of a trust. In my judgment, the object of these words, the trust, the obligation, which the testator intended them to impose was this: that the council were, with his money (and subject, of course, to the obligation about the widow), to create a memorial to himself. His first idea was (and I am not saying that it was either foolish or ignoble) that there should thereafter be in North Tawton, Devon, a memorial to himself; but that the memorial was to have this quality, that it was to be useful; and that I take to mean that it was intended that it should have the quality of utility rather than ornament. Though I do not think aesthetic or ornamental considerations were excluded, still his purpose was that the memorial, whatever form it took and whether material or not, should be useful; and, by way again of anticipation of my answer to Mr. Buckley, I cannot see that it was necessarily to be useful only to the inhabitants of North Tawton.

I have stated my view of the construction and that view answers the first point. It follows that this was not a gift out and out to the North Tawton Parish Council. My view of the intention of those words also carries with it the answer to many of the other points that have arisen. I go further and say that, in the end of all, this case should be decided on the grounds on which Danckwerts J. decided it, namely: that here was a specific obligation sought to be imposed, specific in this sense, that it was to be for the purpose of providing a memorial for this testator having the quality of utility, something obviously that could not be confined to charitable purposes, but no doubt having the quality also that it served a public purpose of some kind. In my judgment this view of the words does carry with it the result, with all respect to the learning which has been put before us, that to hold it valid would be for this court to go beyond (and appreciably beyond) the tenor of the decided cases on these difficult subjects.

I come then to Mr. Arnold's alternative ground. It is plain that once you get involved in the considerations which have been put before us, you are in much more troubled waters than in dealing with the first point. Mr. Arnold has quite rightly drawn our attention to much learning in the form of case law that has grown up round these somewhat involved questions. All those who practise in this branch of the law know how infinite is the variety of the decided cases, how extreme sometimes are the refinements, and how apparent on occasions the contradictions which those cases demonstrate; and that is certainly not the least true about those cases dealing with the law of charity. I wish to acknowledge my indebtedness to Mr. Arnold for putting these matters before us as a premise to my statement that I do not propose in this judgment, by my reference to cases or indeed otherwise, to add to the future burden of citation. I am able fairly to say that and without, I hope, shirking any judicial duty, because the real question in this case does depend upon the meaning of the words this testator has used according to their ordinary sense.

It is convenient and perhaps logical to take first the point that the parish council being, it is said, confined to charitable activities so far as is relevant, then this gift must take its character by reflection of that fact. I am unable to accept that argument. The cases, of which *In re Rumball, decd.*[2] in this court is the most recent, illustrate at any rate this proposition: that gifts to persons holding a particular office, and particularly an ecclesiastical office, if they are not to be treated as gifts to the holder of that office in his personal capacity, are taken to be gifts to be applied for the purposes for which the office is held.

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[2] [1956] Ch. 105; [1955] 1 W.L.R. 1037; [1955] 3 All E.R. 71.

The vicar or the cardinal archbishop (to take references from two cases) receives the gift and disposes of it (as it is said) virtute officii, and the nature of the officium is such that the duties, the trusts, must be ecclesiastical and therefore charitable. If that is accepted, then general words which follow may be regarded either as merely emphasising the fact that the gift is to the ecclesiastical officer virtute officii or, possibly, as intended, not only to do that but also to limit to some extent the scope of his possible disposition, within the scope of his office, of those funds. No decided case, so far as we are aware, has applied that principle to such a body as a parish council. If it were shown perfectly clearly that every activity of a parish council, at any rate so far as gifts were concerned, must be of a charitable character, it might follow that a similar reasoning would apply; but I am not satisfied that it is true to say of a parish council that it is confined in its activities to charitable activities, or that it is so confined as regards any gifts it may receive. I do not forget the argument that you might give something to a vicar not personally, but having attached to it an obligation to apply it for purposes which were outside his ecclesiastical duties, but I cannot find in this case any true analogy to that kind of illustration. There is here a gift to this parish council for the purpose which I have stated, and the relevance of the matter must be (the purpose being a very wide one and not on the face of it charitable): Is the nature of a parish council's activities so clearly defined as being of a charitable character as to impose an essential limitation on the words which I have already tried to construe?

We were referred to section 268 of the Local Government Act, 1933. That deals with acceptance of gifts by local authorities and (so far as relevant) provides: "Subject to the provisions of "this section, a local authority may accept, hold and administer "any gift . . . for any local public purpose, or for the benefit "of the inhabitants of the area," etc. I have no doubt (and I do not think Mr. Arnold really contended to the contrary) that the words "for any local public purpose" cannot be confined in that context to charitable purposes. It is only necessary to refer in passing to the language of Lord Haldane in *Houston* v. *Burns*,[3] to which Mr. Albery drew our attention. The words "local public purposes" are not, according to our law, regarded as being exclusively charitable; and, even against the background of the Local Government Act of 1894, I think it is plain that local public purposes in section 268 of the Act of 1933 are not only charitable purposes. But I do not forget the point that this section deals with acceptance of gifts and would not necessarily colour the general activities of a parish council, though I venture for my part to think that if, in the case of gifts, it is made plain that a parish council can apply them to non-charitable as well as charitable purposes, it is a severe obstacle in Mr. Arnold's way.

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[3] [1918] A.C. 337, 342; 34 T.L.R. 219.

We were further referred to a more recent Act, the Physical Training and Recreation Act, 1937, which extended the powers of local authorities, by section 4 (1), in (among others) the following way: " A local authority may acquire . . . and provide " with suitable buildings . . . lands . . . for the purpose of gymnasiums, playing fields, holiday camps or camping sites, or for the " purpose of centres for the use of clubs, societies or organisa" tions having athletic, social or educational objects, and may " manage those lands and buildings themselves," etc. It is plain enough that the activities there contemplated go far beyond merely charitable activities; but Mr. Arnold has said that any indulgence of the powers by that section by parish councils was rendered retrospectively charitable by section 1 of the Recreational Charities Act, 1958, which provides: " Subject to the provisions of this Act, " it shall be and be deemed always to have been charitable to pro" vide . . . facilities for recreation or other leisure-time occupation, " if the facilities are provided in the interests of social welfare." Subsection (2) imposes a qualification upon that: " The require" ment of the foregoing subsection that the facilities are provided " in the interests of social welfare shall not be treated as satisfied " unless—(*a*) the facilities are provided with the object of " improving the conditions of life for the persons for whom the " facilities are primarily intended, and (*b*) either (i) those persons " have need of such facilities as aforesaid by reason of their youth, " age, infirmity or disablement, poverty or social and economic " circumstances, or "—and then follows a phrase which in a sense slightly startles the reader—" the facilities are to be avail" able to the members or female members of the public at large." I am not satisfied (and I put it quite briefly) that the effect of that section is to limit the powers of a parish council under section 4 of the Act of 1937 to activities in the form of providing such things as holiday camps, clubs and so forth, which would be deemed or would be retrospectively made by the Act of 1958 charitable only. I therefore have not been persuaded, as Danckwerts J. was not persuaded, that the colour or character of the

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gift here made is to be determined by considering that the donee, the parish council, is one whose official activities or whose constitutional functions were limited to charitable activities or functions.

If that view is right, then I am absolved from further considering the kind of case illustrated by the decision which I have earlier mentioned of *In re Rumball, decd.*,[4] and I am not therefore going to take time by considering those cases and answering the hypothetical question—assuming the premise that a parish council is to be treated for this purpose as having charitable functions only—whether one should confine the scope of the relevant language so as not to impose obligations outside the charity. I will, however, venture to add this, that, if I am wrong in the view I have taken as to the nature of the parish council's activities, I am not satisfied, as a matter of construction (and I have already stated what I think the meaning is), that these words can amount to no more than a general direction, with or without limitation, that the parish council is not to take absolutely and beneficially but to apply the fund according to its statutory (and I will now assume charitable) duties. I have stated already my view of the meaning of the words used here, and I hope that in so doing I have justified the conclusion just stated; but, putting it in other words, if the principle illustrated by such cases as *In re Garrard*,[5] *In re Flinn*[6] and *In re Rumball, decd.*[7] (to take three of them) is applicable to such a case as this—that is, to a non-ecclesiastical body or a body like a parish council, and I say no more on the matter whether it would be so applicable at all—the result is that this case falls on a side of the line different from that on which fell the decisions in such cases as *Garrard*,[8] *Flinn*[9] and *Rumball, decd.*[10]

I now turn to Mr. Arnold's alternative argument based on the view that there is here a trust and a trust of a public character, but not a charitable trust. What he says is, that the trust is in line with the trusts which were rendered effective in those cases which I have called "anomalous," and many of which are referred to in Roxburgh J.'s decision, beginning with *Pettingall* v. *Pettingall*.[11] I include in that list cases such as the three to which we have had our attention particularly drawn today. The argument is that assuming the non-charitable but public nature of this trust, still it is of a character which the court can efficiently, and will, enforce. It must be said that these cases are of a somewhat anomalous kind. They are classified in the recent book written by Mr. J. H. C. Morris and Professor Barton Leach, The Rule Against Perpetuities (1956) (p. 298). "We proceed," say the authors, "to examine these 'anomalous' exceptions. It will "be found that they fall into the following groups: (1) trusts "for the erection or maintenance of monuments or graves; "(2) trusts for the saying of masses, in jurisdictions where such "trusts are not regarded as charitable; (3) trusts for the maintenance of particular animals; (4) trusts for the benefit of "unincorporated associations (though this group is more doubt"ful); (5) miscellaneous cases." I am prepared to accept, for the purposes of the argument, that it does not matter that the trusts here are attached to residue and not to a legacy; that is to say, it does not matter that the persons who would come to the court and either complain if the trusts were not being carried out, or claim the money on the footing that they had not been carried out, are next-of-kin rather than residuary legatees. Still, in my judgment, the scope of these cases (and I can call them anomalous because they have been so called both in the book of Mr. Morris and Professor Barton Leach and in the course of the argument) ought not to be extended. So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of perpetuities did not arise; and, in my judgment, that result would be out of harmony with the principles of our law. No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries. These cases constitute an exception to that general rule. The general rule, having such authority as that of Lord Eldon, Lord Parker and my predecessor, Lord Greene M.R., behind it, was most recently referred to in the Privy Council in *Leahy* v. *Attorney-General for New South Wales*.[12] I add also that, in my judgment, the proposition stated in Mr. Morris and Professor Barton Leach's book (p. 308) that if these trusts should fail as trusts they may survive as powers, is not one which I think can be treated as accepted in English law.

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[4] [1956] Ch. 105.

[5] [1907] 1 Ch. 382; 23 T.L.R. 256.

[6] [1948] Ch. 241; 64 T.L.R. 203; [1948] 1 All E.R. 541.

[7] [1956] Ch. 105.

[8] [1907] Ch. 382.

[9] [1948] Ch. 241.

[10] [1956] Ch. 105.

[11] (1842) 11 L.J.Ch. 176.

I therefore, so far as this case is concerned, conclude (having

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[12] [1959] A.C. 457; [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300.

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already stated my view of the meaning of the words) that, though this trust is specific, in the sense that it indicates a purpose capable of expression, yet it is of far too wide and uncertain a nature to qualify within the class of cases cited. It would go far beyond any fair analogy to any of those decisions. I do not wish to take time by much example, particularly because I am not unmindful of having already said that I do not wish to add to the future burden of citation; but, merely by way of example, take trusts for the maintenance of memorials, I refer to *In re Hooper.*[13] That was a case where the purpose of the bequest was to provide for the care and upkeep of certain graves, a vault and monuments. Maugham J. said[14]: "This point is one, to my "mind, of doubt, and I should have felt some difficulty in deciding "it if it were not for *Pirbright* v. *Salwey.*[15] That was a decision "arrived at by Stirling J. after argument by very eminent counsel. "The case does not appear to have attracted much attention in "textbooks, but it does not appear to have been commented upon "adversely, and I shall follow it." It may be said that other cases in regard to monuments, which were closely on the facts in line, might similarly follow the decision of Stirling J., but this case, as I construe the purposes of the gift, is very different from *In re Hooper.*[16]

In re Drummond[17] is the only other case under this head to which I need refer. That was a case, as will be recalled, where Eve J. held valid a gift by will and codicil for the Old Bradfordians Club. He said, in a short judgment, that "there was, in his "opinion, a trust, but there was abundant authority for holding "that it was not such a trust as would render the legacy void "as tending to a perpetuity; . . . The legacy was not subject to "any trust which would prevent the committee of the club from "spending it in any manner they might decide for the benefit of "the class intended." *In re Drummond*[17] was referred to at some little length by Lord Simonds in giving the judgment of the Privy Council in the *Leahy* case[18]; and, if I do not misread Lord Simonds' judgment, he thought that Eve J., in treating the Old Bradfordians Club case as he did, had somewhat overlooked the ground of the earlier decision to which alone he referred in his judgment in *In re Clarke.*[19] Lord Simonds said[20]: "He

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[13] [1932] 1 Ch. 38.
[14] Ibid. 39.
[15] [1896] W.N. 86.
[16] [1932] 1 Ch. 38.
[17] [1914] 2 Ch. 90, 97; 30 T.L.R. 429.
[18] [1959] A.C. 457; [1959] 2 W.L.R. 722.
[19] [1901] 2 Ch. 110.
[20] [1959] A.C. 457, 480; [1959] 2 W.L.R. 722, 733, 737; [1959] 2 All E.R. 300.

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"[Eve J.] cited only *In re Clarke*,[21] though other cases had been "referred to in argument, and he ignored that Byrne J. had been "able to reach his conclusion in that case just because he "regarded the gift as a gift to the individual members of the "corps who could together dispose of its assets as they thought "fit." I do not propose to say more about *In re Drummond* [22] save this, that it seems on its facts to be a very widely different case from the present, and I am certainly not prepared to say that *In re Drummond* [22] is an authority which we should use as justifying an acceptance of the validity of this trust, making it (so to speak) a further addition to the anomalous number of cases classified in Morris and Professor Barton Leach's book.

I should, perhaps, not pass from this point without a mention of a recent case (not, I think, reported, but referred to in argument) of *In re Catherall, decd.*,[23] decided by Roxburgh J. It was a case in which the testator had made the following disposition, according to the citation in the affidavit of which we have a copy: "(1) Unto the vicar and wardens of St. John's Church, "Great Harwood, £2,500 for a peal of bells and a clock for the "tower in memory of my dear parents and devoted sister; "(2) Unto the vicar and wardens of Great Harwood Parish "Church £1,000 for a suitable memorial, at their discretion, in "memory of my dear parents and devoted sister; (3) Unto the "vicar and wardens of Great Harwood Parish Church £500 for "the upkeep and attention to the family grave." The question arose as to the second of those gifts, £1,000 for a suitable memorial. According to the note with which Mr. Buckley has provided us, Roxburgh J. thought that was valid. He said, according to the note: "It was argued whether this is a "charitable disposition. I have reached no concluded opinion "on that." Then he says: "Distinctions are very fine," an observation which may fairly find its place in every judgment on this type of issue. "I could construe the words as meaning "such purposes (of a religious character) as they may think fit, "being suitable as a memorial; that is, charitable; or I could "construe the words as meaning any purpose suitable as a "memorial; that is, non-charitable. But there is another ground "on which this trust can be upheld. It is not perpetuitous. I "went into these cases in *In re Astor*.[24] Such a trust as this is "valid whether charitable or not. Purpose must embody a

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[21] [1901] 2 Ch. 110; 17 T.L.R. 479.
[22] [1914] 2 Ch. 90.
[23] Unreported—1958 C. No. 2676.
[24] [1952] Ch. 534.

"definite concept, and means to attain it must be described with "sufficient certainty. In this case I should have no difficulty in "deciding what would be a suitable memorial." Of course, we do not know much of the facts of that case, but the memorial was to be a "suitable" memorial in memory of the testator's parents and devoted sister, of whom we know nothing at all. I am not therefore saying that this decision was in any way decided on wrong grounds; but it does seem to me, in its context, that in any event the decision could be justified on the ground that in its context the purposes were limited to religious (that is, charitable) purposes.

That brings me then back to the question of construction in relation to the point raised by Mr. Buckley, and I have already largely anticipated my answer to it. It is true, as Mr. Buckley pointed out, that there are several instances, in the books, of trusts expressed to be for the benefit of the inhabitants of a place or parish which have been held to be valid charitable trusts. They are discussed in a recent case of *Williams' Trustees* v. *Inland Revenue Commissioners* [25] by Lord Simonds; and as regards these cases also, as Lord Simonds observed, there is some ground for saying that they are anomalous. Whether some owe an origin to the strict language of Lord Macnaghten's famous fourth category of charities or not, it is no doubt true to say that that particular formula, "for the benefit of the inhabitants of A," has been taken on several occasions to be one which inherently has the quality that it is within the intendment of the Statute of Elizabeth, that the benefit indicated is the sort of benefit which would make it a charitable disposition. But the formula is not the same as that here used. It may well be, as Mr. Buckley observed, that purposes which are useful to a community will also benefit the community; but that, I think, is not the point. The formula is different. What the testator meant was that this council should provide a memorial to himself having the quality that it should be useful, which I take to mean useful rather than (though not necessarily exclusive of) being ornamental. I cannot myself see that the utility is confined to the inhabitants of North Tawton. In the course of the argument a car park was suggested. Whether that is a good illustration, it is not for me to say; but if it were a suitable memorial in other respects, its utility certainly would not be confined to the inhabitants of North Tawton. It would be wrong to treat this formula as being merely

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[25] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 573; 27 T.C. 409.

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synonymous with "for the benefit of the inhabitants of North "Tawton," and so construing it (but, as I think, illogically), to give to this formula the inherent quality which would make it a charitable gift. It would be contrary to the tenor of the law, more particularly as it has been recently expounded, and it would be carrying this case beyond any limits which authority justifies.

Those, then, are my reasons for the conclusion which I stated at the beginning of this judgment, that in my view Danckwerts J. rightly decided the case, and I therefore would dismiss the appeal.

SELLERS L.J. I agree with my Lord's judgment and find nothing I wish to add.

HARMAN L.J. I agree. At first sight, my mind recoiled from the possibility of this gift being held valid, and I have not seen any cause in the course of the hearing to resile from that view. One must first construe the will; and my view of that is that this testator, as my Lord has said, intended by his will to provide himself with a memorial in his native town. He added that the memorial to himself should also be useful. In other words, it must not consist of a statue of the testator "in his habit as he "lived,"[26] unless that would serve some useful purpose; but it was not primarily of the benefit to the inhabitants of North Tawton that he thought, but of perpetuation of his own memory. So read, it seems to me apparent that the law cannot uphold the will, unless connected with the fabric of a church, without throwing over every kind of authority on this subject. A gift for public purposes in the parish of North Tawton, a gift for patriotic purposes, a gift for benevolent purposes, are all, as we all know, universally now held to be bad. How, then, shall it be held that a gift for useful purposes is good without upsetting the whole structure so elaborately built up and, one had hoped after *Diplock's* case,[27] so firmly established? I cannot think that charity has anything to do with this bequest. As for establishing it without the crutch of charity, I applaud the orthodox sentiments expressed by Roxburgh J. in the *Astor* case,[28] and I think, as I think he did, that though one knows there have been decisions at times which are not really to be satisfactorily classified, but are perhaps merely occasions when Homer has nodded, at any rate these cases stand

[26] Hamlet, Act III, Scene iv.

[27] [1941] Ch. 253; [1944] A.C. 341; [1944] 2 All E.R. 60.

[28] [1952] Ch. 534.

by themselves and ought not to be increased in number, nor indeed followed, except where the one is exactly like another. Whether it would be better that some authority now should say those cases were wrong, this perhaps is not the moment to consider. At any rate, I cannot think a case of this kind, the case of providing outside a church an unspecified and unidentified memorial, is the kind of instance which should be allowed to add to those troublesome, anomalous and aberrant cases.

In my judgment, Danckwerts J. came to the right conclusion, and this appeal ought to be dismissed.

Appeal dismissed with party and party costs of the parties other than the Attorney-General.

Solicitors: *Biddle, Thorne, Welsford & Barnes for G. D. Cann & Hallett, Exeter; Peacock & Goddard; Treasury Solicitor.*

B. A. B.

In re MORITZ, DECD.

1959
Nov. 3.
Wynn-Parry J.

[1959 M. No. 1558.]

Trust and Trustee—Proceedings by trustee against beneficiary—Practice —Application for directions whether to take proceedings against beneficiary—Whether proposed defendants entitled to be heard— Claim to see evidence—Bank executor.

The executor of a will took out an originating summons, to which all the residuary beneficiaries under the will were defendants, asking the court for directions whether they should take certain proceedings against two of the beneficiaries. The proposed defendants were supplied with copies of the affidavits filed on the originating summons but not with copies of the exhibits thereto. On an application by those defendants for an order on the executors' solicitors to supply them with copies of certain of the exhibits:—

Held, that where a trustee found himself compelled to ask for directions whether or not proceedings should be taken against a beneficiary, while it was proper and indeed necessary to join the parties against whom the proposed relief was sought, it was not the practice in the Chancery Division that those parties should be

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

present in chambers when the matter was debated, and they should not be furnished with the evidence upon which the court was asked to act.

In re Kay's Settlement Trusts [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245 distinguished.

PROCEDURE SUMMONS.

On June 22, 1959, the Midland Bank Executor and Trustee Co. Ltd., the executor of the will of Martin Rudolph Moritz, deceased, took out an originating summons asking, inter alia, for directions whether it should or should not institute and prosecute an action against Ralph Gosler and Hilda Gosler, his wife, two of the beneficiaries under the will. All the beneficiaries under the will, including the proposed defendants, were joined as defendants to the summons. The proposed defendants were supplied with copies of the affidavits sworn on the originating summons but not with copies of the exhibits thereto. On October 22, 1959. the proposed defendants took out a summons asking that the plaintiff's solicitors be ordered to supply to them copies of certain of the exhibits. This summons was adjourned into court by the master for argument.

A. J. Balcombe for the applicants, the proposed defendants. The applicants are together interested in one-third of the residue of the deceased's estate. They are entitled, as beneficiaries, to be heard on the question whether or not the executor should be allowed to incur costs in bringing an action. They are entitled to be heard on this question although they are the persons against whom the executor wishes to bring the action: *In re Kay's Settlement Trusts.*[1] The plaintiff has supplied to the applicants copies of the affidavits, which contain nothing of substance, but not of the exhibits. A party who is entitled to see an affidavit is entitled to see the exhibits thereto: *In re Hinchliffe.*[2] There appears to be no statement of the practice, and it is submitted that there is no settled practice. If a person is interested in the estate, he should be made a defendant to the summons asking for directions whether to bring an action and should be supplied with copies of the evidence; and, on the hearing, he should be entitled to present arguments to the court, but it should be in the discretion of the judge whether those arguments are heard in the presence of the other parties. It is natural justice that persons whose pecuniary interest is liable to be injured should be entitled to be heard as beneficiaries whose money the executor proposes to spend on the litigation. This is not a case, as was *Sloane* v. *British Steamship Co. Ltd.*,[3] where the exhibits were for the information of the court. The affidavit was filed in an originating summons to which the applicants are defendants and in which it is sought to spend their money.

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[1] [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245.

[2] [1895] 1 Ch. 117.

John L. Knox for the executor. There are four submissions. (1) A distinction must be drawn between cases where there is a pure question of law, such as in *In re Kay's Settlement Trusts*,[4] and cases where there is an issue of fact in which it is not proper for the proposed defendants to see the evidence. The present case belongs to the latter class of cases. (2) The rule that a person who is entitled to see an affidavit is entitled to see the exhibits is not unqualified. For example, where the exhibit is for the information of the court, as in *Sloane* v. *British Steamship Co. Ltd.*,[5] and, where leave is sought to bid at a sale ordered by the court, the party seeking leave is not entitled to see the exhibits relating to valuation: Daniel's Chancery Forms, 7th ed., p. 13, note (*z*). (3) There is a settled practice that, where an application is made for directions whether or not to bring an action against certain of the beneficiaries, the proposed defendants do not see evidence on which there is a dispute. (4) It was proper for the executor to join the applicants, because they were beneficiaries in the estate. It would have been incorrect to have applied ex parte.

[He was stopped.]

A. J. Balcombe in reply. (1) The question the court will have to decide on the originating summons is whether or not a prima facie case has been disclosed. That is a question of law and not of fact. (2) So far as an application for leave to bid is concerned, it is not the subject of a reported case. It is just a matter of practice. *Sloane* v. *British Steamship Co. Ltd.*[5] was an ex parte application. The present application is inter partes and the applicants are interested in the relief sought. (3) If there is a settled practice, which is not conceded, and it is as the executor contends, then it is submitted that it is wrong. The applicants are entitled to address the court on the question whether there is a prima facie case, for it is their money which is proposed to be spent. (4) Admittedly it was correct to join the applicants as defendants to the originating summons, because they have an interest as beneficiaries; but it is unjustifiable that, having properly been joined, they are not entitled to see the evidence.

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[3] [1897] 1 Q.B. 185; 13 T.L.R. 124.

[4] [1939] Ch. 329.

[5] [1897] 1 Q.B. 185.

WYNN-PARRY J. This is a summons brought by two of the defendants to the originating summons, namely, the eighth and ninth defendants, that they should have an order on the plaintiff's solicitors to supply copies of certain exhibits forming part of the evidence in the case. The originating summons is taken out by the Midland Bank Executor and Trustee Co. Ltd. as plaintiff against nine defendants, of whom those who apply before me are the eighth and ninth, to put it shortly, to resolve a number of disputes which have arisen in the administration of the estate of the deceased. One of the questions which is asked by the bank in the originating summons is for directions as to whether certain proceedings, which I need not particularise, should be brought by the bank against the eighth and ninth defendants, who have, of necessity, been joined in the originating summons. In support of that particular application an affidavit has been sworn on behalf of the bank, and indeed certain allegations have been made against the eighth and ninth defendants. In support of those allegations a volume of exhibits has been filed.

Putting it shortly, the application of the eighth and ninth defendants is that at this stage they ought to be furnished with copies of those exhibits in order, as they say, to be put in a position to argue before the court whether or not the bank should be allowed to proceed with the action against them as to which the bank seeks directions. Speaking for myself, so far as I know, it has been the practice of this court, without exception, over a great many years, that where, in such a case as this, application is made by a trustee, ex necessis where there are disputes, for directions from the court as to whether or not proceedings should be brought against the defendants, those defendants are not entitled to be heard upon that application. The court acts upon such evidence as is placed before it and it expresses itself one way or the other.

My attention, however, was drawn to the case of *In re Kay's Settlement*,[1] a decision of Simonds J., where the court decided in limine that proceedings should not be brought. But that was a case in which it appears quite clearly upon the facts that there was no dispute whatsoever as to the evidence in question. It all turned upon the right view to be taken of the voluntary settlement and the court was armed upon the face of it with all the evidence required to decide the question once and for all; and in that event Simonds J. decided that the action should not proceed. That appears to me quite a different case from the present case.

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[1] [1939] Ch. 329; 55 T.L.R. 332; [1939] 1 All E.R. 245.

My attention was also drawn to the case of *In re Hinchliffe*,[2] in which the Court of Appeal laid down as a general rule that, if a document is made an exhibit to an affidavit, any person who has the right to take copies of the affidavit has a similar right in the case of the exhibits also. With that proposition one could not, of course, properly quarrel, but that does not deal in the least with the practice in Chambers in this Division. As I understand it, the practice in this Division is that where a trustee finds it is compelled to ask for the directions of the court as to whether or not certain proceedings should be taken, while it is proper and indeed necessary to join the parties against whom the proposed relief is sought, those parties should not be present in Chambers when the matter is debated; and they should not be furnished with the evidence upon which the court is asked to act. The court in these circumstances is appealed to by the trustee to say "Aye," or "No," in view of the circumstances put before it, should the action proceed, and, if so, how far? Very frequently, the leave to proceed is limited, for instance, up to discovery, but it would seem to me to be a quite unjustified inroad upon what I conceive to be a very useful practice if I were to allow this application and to allow the two defendants not merely to be present at the beginning of the proceedings when the originating summons is heard, but to remain there throughout those proceedings and to have all the evidence on which the trustees are asking the court for its directions. I know of no precedent for it, and, in my view, it is completely against the established practice.

I say nothing about the final incidence of costs. It was pressed upon me that the eighth and ninth defendants stand substantially to lose if I hold against them because they are interested in one-third of the estate. That appears to me to be a matter which can be adequately dealt with by the court, either when the originating summons comes before it, or, indeed, if an action is brought, when the action is heard. But, upon the facts

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[2] [1895] 1 Ch. 117.

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which have been opened to me, I do not feel justified in interfering with the practice which, in my own experience, has been followed for many years, and I think in the experience of my brethren, and, therefore, I refuse this application.

Application refused. The bank's costs and expenses of and incidental to the application to be taxed and paid out of the estate. Final incidence of costs as between the beneficiaries reserved.

Solicitors: *Kingsford, Dorman & Co., for Dawe & Co., Kingston-upon-Thames; Wild, Collins & Crosse.*

1959
Oct. 13.

Roxburgh J.

HARRIS *v.* YARM.

Solicitor—Costs—Taxation—Charging order—Application for order on funds in court—Application more than 12 *months after delivery of bill of costs—Jurisdiction to order taxation—Whether taxation may be ordered at any time—Whether special circumstances—" At " any time "—Solicitors Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 27), *ss.* 69 (2), *proviso* (*i*), 72.

A summons was taken out by the solicitors to the plaintiff in a partnership action for a charging order upon a moiety of the funds in court to the credit of the action for the balance of a bill of costs delivered to the plaintiff. More than 12 months had expired since the delivery of the bill. The master made the charging order as asked but, notwithstanding the provisions of section 72 of the Solicitors Act, 1957,[1] did not order that the costs should be taxed, as he did not think that the plaintiff had shown any special circumstances within the meaning of section 69 (2), proviso (i), of the Act[1] for the granting of such an order:—

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

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[1] Solicitors Act, 1957, s. 69: " (1) On the application, made within " one month of the delivery of a " solicitor's bill, of the party charge-" able therewith, the High Court " shall, without requiring any sum to " be paid into court, order that the " bill shall be taxed and that no " action shall be commenced thereon " until the taxation is completed. " (2) If no such application is made " within the period mentioned in the " last foregoing subsection, then, on " the application either of the solicitor " or of the party chargeable with the " bill, the court may, . . . order— " (*a*) that the bill shall be taxed; " . . . Provided that—(i) if twelve

Held, that section 72 of the Act was not subordinate to section 69, and that the words "at any time" in section 72 meant that the court might make an order for taxation at any time, provided that the right to recover the costs was not barred by any statute of limitation, and the jurisdiction to make such an order was not restricted, in the absence of special circumstances, to 12 months after the delivery of the bill.

ADJOURNED SUMMONS.

The plaintiff in a partnership action, Mrs. Betty Harris, and the defendant, Mrs. Paulette Yarm, carried on a business under the name of "The Can Can Coffee Bar." During negotiations for the sale of the defendant's interest in the partnership to the plaintiff a sum of £100 was handed by the plaintiff to her solicitors for the special purpose of paying to the defendant the deposit on the proposed sale. The proposed sale miscarried and a receiver was appointed who eventually sold the business to two persons named Chapman and Maclean. As from May 19, 1955, the date of the completion statement in relation to the sale, the special purpose for which the £100 was entrusted to the solicitors was at an end and they held the money to the order of the plaintiff. The solicitors retained the £100; they did not write to the plaintiff and tell her that they were going to retain it as security for their costs, although, in a subsequent letter to the Law Society, they stated that they had agreed with the plaintiff that the £100 should be treated as security for costs.

The solicitors' costs in relation to the sale were included in the receiver's account but were disallowed by the master on March 16, 1956. The solicitors did not render to the plaintiff a bill of costs in relation to the sale, but prepared a bill in relation to the partnership action which they sent to the plaintiff on September 27, 1956, with a letter which read: "Dear Madam, "Yourself *v.* Yarm. Having regard to the series of unpleasant "incidents to which we have been subjected, we have taken the "trouble of having drawn by an independent costs draftsman a

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"months have expired from the "delivery of the bill, . . . no order "shall be made on the application of "the party chargeable with the bill "except in special circumstances. ". . ."

S. 72: "Any court in which a "solicitor has been employed to "prosecute or defend any suit, "matter or proceeding may at any "time declare the solicitor entitled to "a charge on the property recovered "or preserved through his instru"mentality for his taxed costs in "reference to that suit, matter or "proceeding, and may make such "orders for the taxation of the said "costs . . . as they think fit . . . "Provided that no order shall be "made if the right to recover the "costs is barred by any statute of "limitations."

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"detailed bill of costs on a solicitor and client basis as against "yourself in the above proceedings. We enclose it to you herewith. You will observe that it totals £244 19s. 2d. The bill, "you will note, does not take into account any costs to us in "connection with the sale of the business, and we reserve the "right in due course to carry in a bill to you in respect thereof. ". . . At the same time may we take the opportunity of reminding you that in the Theodorou matter you have ignored our "most recent communication. . . . We did offer, we think "generously, to meet you substantially on agreement of costs. "We are still willing to renew our offer, but it must be upon the "basis that you will guarantee to us that we will not be subjected "either by you, your son-in-law, your husband or any other party "to the insults and embarrassments of the nature which has been "our experience in the past. You are entitled to credit for the "sum of £100 received by us from you at the outset of this "litigation."

The plaintiff took out a summons asking that the funds in court to the credit of the action be paid as to one-half to each of the parties; and the solicitors took out a summons asking for a charging order on the plaintiff's moiety of the funds for the balance of the bill delivered to her on September 27, 1956, after allowing for the £100. Master Hawkins made a charging order in the solicitors' favour, but did not think it necessary to order taxation; and the summons was adjourned to the judge at the plaintiff's request.

The plaintiff appeared in person. Section 72 contains no time limit; it says that an order can be made "at any time." Section 72, however, is not governed by section 69, and, therefore, the master's decision was wrong. Even if section 72 were dominated by section 69, there are in this case "special circumstances" within the meaning of section 69 by reason of which the order ought to be made. Those special circumstances are the way in which the solicitors dealt with the £100, and their conduct generally in regard to the whole action.

[ROXBURGH J. I expect Mr. Bagshawe to explain his grounds for supporting the master's view that section 72 is governed by section 69, having regard to the words "at any time" in section 72.]

Edward Bagshawe for the solicitors. There is no authority directly in point. The application is made under section 72. The view on which the master proceeded was that, when the

Act referred to the order being made "at any time," what was meant was "at any time in so far as the contrary is not herein-"before provided." The other construction of section 72, for which the plaintiff contends, would give the court power to get round section 69. It is improbable that the legislature intended that to be the position.

[ROXBURGH J. The Annual Practice for 1960 says at page 3081 that an application can be made at any time and that delay is not a ground for refusing an order unless other rights in the property have arisen: see *In re Born.*[2]]

Section 72 goes back as far as the Solicitors Act, 1860, but the words "at any time" do not appear in the corresponding section, section 28. Those words were introduced in section 69 of the Solicitors Act, 1932. [Reference was made to *Higgs* v. *Higgs*[3] and *In re Clayton.*[4]]

It is submitted that there were here no special circumstances. The solicitors are entitled to some remuneration for the work they have done. The £100 is not a special circumstance; it is merely a matter of account. The fact that the solicitors have the £100 means that the plaintiff will have to pay only the balance of the costs.

ROXBURGH J. referred to the facts and read the letter dated September 27, 1956, and continued: In my view, there are two special circumstances. There is the £100 and there is the reservation of the right to carry in a bill in relation to a matter intimately connected with the action. The bill has not yet been delivered, but the right is still being kept on foot.

I do not know whether the guarantee referred to in the letter is limited to the Theodorou matter or whether it is not, nor would it sound unreasonable if it was limited to the plaintiff or her husband and possibly her son-in-law; but how could it possibly be right to expect her to give some indemnity against any other party, which I suppose means anybody in the whole world? I do not think that a solicitor ought ever to ask for anything in those wide terms. I am not concerned with professional misconduct or with negligence, and I am not saying that to do that is either of those things, but I do not think that that is the normal way in which solicitors conduct their business, and, therefore, it would be a special circumstance.

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[2] [1900] 2 Ch. 433.

[3] [1934] P. 95; 50 T.L.R. 313.

[4] [1940] Ch. 539; 56 T.L.R. 512; [1940] 2 All E.R. 233.

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The story can be told in the words of the master: " On April " 28, 1959 "—I am now reading from the master's note to me— " the plaintiff filed a notice of intention to act in person in place " of Messrs. Bieber & Bieber, who had been her solicitors throughout the proceedings. Shortly after this the plaintiff issued a " summons asking that the funds in court "—those, of course, were what was realised in the partnership action—" be paid as " to one-half to each of the parties and that the proceedings be " stayed. That summons came before me on May 27, 1959. At " the same time I had before me the present summons issued " by Messrs. Bieber & Bieber, asking for a charging order upon " a moiety of the funds for the sum of £144 19s. 2d., being " the balance of a solicitor and client bill of costs of this action " delivered to the plaintiff on September 27, 1956, after allowing " for £100 received at the beginning of the litigation. . . . The " plaintiff eventually filed the evidence sent herewith, but it " appeared to me that Messrs. Bieber & Bieber were entitled to " the order asked for, and I accordingly proposed to make a " charging order in their favour in the terms of the summons."

The master then referred to section 69 (2) (*b*) (i) of the Solicitors Act, 1957, and said: " I did not think that the plaintiff " had shown any special circumstances." He then cited section 72, and said: " I did not think it necessary, notwithstanding a " reference to ' taxed costs ' in section 72, to have the costs taxed " having regard to the provisions of section 69."

Therefore, the question before me is whether the master ought to have directed a taxation of the costs of the action as between a solicitor and his client, or whether he ought to have directed that the specified sum of £144 19s. 2d. should be charged on a moiety of the fund in court, which is a pure question of law, except in so far as the question of what are special circumstances does depend, as many judges have said hitherto, on the facts of each case.

I regret to say that I think that the master was wrong. Section 72 of the Solicitors Act, 1957, provides: " Any court in " which a solicitor has been employed to prosecute or defend any " suit, matter or proceeding may "—a great many judges have held that that word means " may " and imports a complete discretion, and so far as that is concerned the law is quite clear; but now come some very important words, on which I think there is no existing authority—" at any time declare the solicitor entitled " to a charge on the property recovered or preserved through his

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"instrumentality"—and I am quite prepared to treat this moiety of the fund in court as answering that description—"for his taxed "costs in reference to that suit, matter or proceeding, and may "make such orders for the taxation of the said costs and for "raising money to pay, or for paying, the said costs out of the "said property as they think fit, and all conveyances and acts "done to defeat, or operating to defeat, that charge shall, except "in the case of a conveyance to a bona fide purchaser for value "without notice, be void as against the solicitor: Provided that "no order shall be made if the right to recover the costs is barred "by any statute of limitations."

Though there is no authority on the point, there is nothing anywhere to suggest that section 72 is in any way subordinate to section 69. There is nothing in the Annual Practice nor in any of the reported cases to suggest that. The words "at any time" were not in the Act of 1860 and were introduced into the Solicitors Act, 1932. In my view, they must mean what they say—at any time—provided that the right to recover the costs is not barred by any statute of limitations, and that operates both for and against solicitors. In one of the reported cases [*In re Born* [1]] it operated for solicitors who had been very dilatory; in another case (indeed, in this case) it will operate in favour of a client who undoubtedly has been very dilatory.

I cannot see how section 69 could be paramount to section 72, because section 72 says that the court "may make such orders "for the taxation of the said costs," and those costs are the costs of the action. To say that the court may make orders for taxation of the costs of the action at any time, provided that the statute of limitations does not intervene, is quite inconsistent with the hypothesis that it cannot make them after 12 months "except in special circumstances." The two things cannot stand together. The point really seems to me to be clear.

This is a point of law affecting the whole of the profession of solicitors. I have had a very careful argument from Mr. Bagshawe; it is a short point, and I cannot see it. It seems to me that it is entirely a matter of discretion.

Looking at the case as a whole, taking into account those things which I have already said are special circumstances, and taking into account a great many things which may or may not be special circumstances, but certainly afford a background to the picture, the general way in which the solicitor has conducted

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[1] [1900] 2 Ch. 433.

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the matter, not yet having delivered his final bill of costs for something which was finished many years ago, his obvious distaste for the client, her obvious distaste for him, and every possible feature showing how unfortunate the relations between the solicitor and his client were, I certainly exercise my discretion (which I believe to be quite unfettered, except by those rules by which every judicial discretion is fettered) in favour of ordering the charge to be for such sum as shall be found on taxation to be due to the solicitor.

What I propose to do is to declare that the solicitor is entitled to a charge on the moiety of the fund in court for his taxed costs in reference to the partnership action, and order taxation accordingly.

I have already said that in my judgment section 69 has nothing whatever to do with the matter, but if I am wrong in that, in my judgment there are special circumstances in this case, and I have endeavoured to indicate what, in my opinion, the special circumstances are; in other words, even if section 69 does apply, I consider that, in the special circumstances, I am entitled to make the order which I have made.

Order accordingly.

Solicitors: *Alfred Bieber & Bieber.*

1959
Oct. 22,
23, 27;
Nov. 13.

Danckwerts J.

J. BOLLINGER AND OTHERS v. COSTA BRAVA WINE CO. LTD.

[1958 J. No. 6442.]

Passing Off—Non-exclusive trade description—Geographical term—Use of name "champagne"—Right to exclusive use of description claimed by class of producers in Champagne district of France—Description used by producers of wine outside district—Whether unlawful trade competition—Whether action lies at suit of class.

Statutory Duty—Civil action, whether created—False trade description—Whether breach of duty owed to rival trader—Merchandise Marks Act, 1887 (50 *&* 51 *Vict.* c. 28), *ss.* 2, 3, 19 (*as amended by Merchandise Marks Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 48), *ss.* 1, 4).

Tort—New tort—Unlawful trade competition—Deliberate damage to property of another—Development of passing off.

The plaintiffs, J. Bollinger and eleven other companies incorporated under French law, suing on behalf of themselves and all other persons producing wine in the Champagne district of France which was supplied to England and Wales, claimed an injunction restraining the defendants, the Costa Brava Wine Co. Ltd., from applying the trade descriptions "champagne" or "Spanish Champagne" to wine made in Spain or from grapes grown in Spain, from passing off such wine as wine produced in the Champagne district by selling it as "Spanish Champagne" or under any other name including the name "champagne" and a declaration that the description "Spanish Champagne" or one including "champagne" was a false trade description. By their statement of claim the plaintiffs alleged that their wine was a naturally sparkling wine produced in the Champagne district by a process of double fermentation from grapes grown in the district, that it had long been known to the trade and public in the United Kingdom as "champagne" and as such had acquired a high reputation and that a member of the public or trade would understand "champagne" to mean their wine. They further alleged that the descriptions used by the defendants were false trade descriptions of wine produced in Spain, that sales of the wine by the defendants were an offence under section 2 (2) of the Merchandise Marks Act, 1887,[1] and were in breach of the statutory duty which the defendants owed to the plaintiffs and that the defendants were acting in unlawful trade competition with the plaintiffs. The defendants denied that they had passed off their wine for that of the plaintiffs, or that if they had so passed it off, they had done anything for which the plaintiffs had a cause of action in English law; they also denied that the descriptions were false trade descriptions within the meaning of section 2 (2), or that the subsection imposed any statutory duty upon them, and that any of their alleged acts constituted unlawful competition; alternatively, they contended that unlawful competition was not a cause of action known to English law.

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[1] Merchandise Marks Act, 1887, as amended, s. 2: "(1) Every person "who . . . (*d*) applies any false trade "description to goods . . . shall, sub"ject to the provisions of this Act, "and unless he proves that he acted "without intent to defraud, be guilty "of an offence against this Act. (2) "Every person who sells, or exposes "for, or has in his possession for, "sale, or any purpose of trade or "manufacture, any goods or things "to which any forged trade mark or "false trade description is applied, or "to which any trade mark or mark "so nearly resembling a trade mark "as to be calculated to deceive is "falsely applied, as the case may be, "shall, unless he proves either—(*a*) "that, having taken all reasonable "precautions against committing an "offence against this Act, he had, at "the time of the commission of the "alleged offence, no reason to suspect "the genuineness of the trade mark, "mark or trade description, and that, "on demand made by or on behalf "of the prosecutor, he gave all the "information in his power with res"pect to the persons from whom he "obtained such goods or things; or "(*b*) that otherwise he acted inno"cently; be guilty of an offence "against this Act."

S. 3: "The expression 'trade de"'scription' means any description, "statement, or other indication, direct "or indirect, . . . (*b*) as to the place "or country in which any goods were "made or produced, or (*c*) as to the "mode of manufacturing or producing "any goods, or (*d*) as to the material "of which any goods are composed. ". . . The expression 'false trade "'description' means a trade descrip"tion which is false or misleading in "a material respect as regards the "goods to which it is applied. . . ."

S. 19: "(1) This Act shall not "exempt any person from any action, "suit, or other proceeding which "might, but for the provisions of "this Act, be brought against him."

On the preliminary trial of the following points of law: (a) whether, assuming the truth of the plaintiffs' allegations, if the defendants had, as alleged, passed off their wine for that of the plaintiffs they had done any act in respect of which the plaintiffs had a cause of action according to English law; (b) whether section 2 (2) imposed a statutory duty on the defendants or a duty owed by them to the plaintiffs, and, if it did, whether it gave rise to an action in law; and (c) whether the plaintiffs' allegation that the defendants' acts constituted unlawful trade competition was sufficient to support a cause of action in English law:—

Held, (1) that the law of passing off was not so limited in scope as to allow a person competing in trade to attach to his product a name or description with which it had no natural association, so as to make use of the reputation and goodwill gained by a product genuinely indicated by that name and description, and that it made no difference if the persons truly entitled to describe their goods by that name were a class producing goods in a certain locality and not merely one individual, for the description was part of their goodwill and a right of property. The law would fail if, as a general rule, it could offer no remedy for the deliberate act of one person causing damage to the property of another and it should, and did, provide a remedy for the type of unfair competition alleged in the statement of claim. Accordingly, on the assumptions made therein, the plaintiffs had a right of action under paragraphs (a) and (c) of the points of law (post, pp. 283 and 284).

Pillsbury-Washburn Flour Mills Co. Ltd. v. *Eagle* (1898) 86 Fed.Rep. 608, and dicta of Lord Parker in *A. G. Spalding & Brothers* v. *A. W. Gamage Ltd.* (1915) 32 R.P.C. 273, 284; 31 T.L.R. 328, of Lord Herschell in *Reddaway* v. *Banham* [1896] A.C. 199, 209; 12 T.L.R. 295; 13 R.P.C. 218, of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ltd.* [1932] 1 Ch. 201, 210; 48 R.P.C. 580, and of Goddard L.J. in *Draper* v. *Trist* [1939] 3 All E.R. 513, 526; 56 R.P.C. 429 applied.

Dent v. *Turpin* (1861) 2 J. & H. 139 and *Southorn* v. *Reynolds* (1865) 12 L.T. 75 considered.

Whitstable Oyster Fishery Co. v. *Hayling Fisheries Ltd.* (1900) 17 R.P.C. 461; (1901) 18 R.P.C. 434 distinguished.

(2) That, on consideration of the whole Act, a breach of the Merchandise Marks Act, 1887, did not give rise to any civil right of action in a rival trader; if the protection of any class of person was contemplated, it was the purchasers of goods which might be misleadingly described, but the rights of rival traders in a passing-off action and of purchasers of goods in an action based on deceit

were carefully preserved by section 19 and no cause of action was given except where expressly provided. Accordingly, the Act imposed no statutory duty on the defendants, breach of which would enable the plaintiffs to bring an action against them (post, p. 287).

Dicta of Lord Simonds in *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398, 407; 65 T.L.R. 170; [1949] 1 All E.R. 544 applied.

Preliminary points of law set down for hearing before trial under Order 25, rr. 2, 3.

The plaintiffs, J. Bollinger, Champagne Charles Heidsieck, Champagne Heidsieck & Cie., Monopole, Krug & Cie., Champagne Lanson Père & Fils, Champagne Louis Roederer, Maison A. Mérand & Cie., Maison Moët & Chandon, G. H. Mumm & Cie., Champagne Perrier Jouët, Champagne Pol Roger & Cie. and Veuve Clicquot Ponsardin, issued a writ claiming an injunction restraining the defendants, the Costa Brava Wine Co. Ltd., from applying the trade descriptions "champagne" or "Spanish "Champagne" to wine made in Spain or from grapes grown in Spain, and from passing off, as and for wine produced in the Champagne district, wine not so produced by advertising, offering for sale, or selling it as Spanish champagne or under any other name or description that included the name "champagne," and a declaration that the description "Spanish Champagne" and any other description including the name "champagne" was a false trade description of wine made in Spain or from grapes grown in Spain.

By their statement of claim the plaintiffs alleged: (1) The plaintiffs, companies incorporated under the law of France, carried on business in the Champagne district of France as producers of wine which they supplied to England and Wales. The plaintiffs were suing on behalf of themselves and of all other persons who produced wine in the district and who supplied it to England and Wales.

(2) The wine produced by the plaintiffs was a naturally sparkling wine produced in the Champagne district by a process of double fermentation from grapes grown in the district, and it was and had for long been known to the trade and public throughout the United Kingdom as "champagne," and as such had acquired a high reputation. Any member of the trade or public in the United Kingdom ordering champagne or seeing wine advertised or offered for sale as champagne would expect it to be a naturally sparkling wine produced in the Champagne district from grapes grown there.

(3) The defendants, who carried on business at No. 75, Gray's Inn Road, London, W.C.1, as wine and spirits merchants, had passed off and threatened and intended to pass off, as and for champagne, wine not produced by the Champagne houses in the Champagne district from grapes grown in that district, offering for sale and selling the same as "Spanish Champagne."

(4) The descriptions "champagne" and "Spanish Champagne" were false trade descriptions of wine produced in Spain, and the sale by the defendants of wine to which a false trade description had been applied was an offence under section 2 (2) of the Merchandise Marks Acts, 1887 to 1953, and was in breach of the statutory duty which the defendants owed to the plaintiffs.

(5) The acts of the defendants constituted unlawful competition with the plaintiffs in the way of trade. By paragraph (6) the plaintiffs claimed that they had suffered damage, and that the defendants intended to continue what they had been doing.

The defendants by their defence admitted that a naturally sparkling wine produced in France had for a number of years past been sold in England under the description "champagne"; and that they were, and intended to continue, selling a wine produced in Spain under the name "Spanish Champagne," but they denied that if they had passed off their wine for champagne they had done any act in respect of which the plaintiffs had a cause of action against them according to English law. They also denied that the names "Spanish Champagne" or "champagne" were false trade descriptions, or that section 2 (2) of the Merchandise Marks Act, 1887, imposed any statutory duty on them, or that any statutory duty was owed by them to the plaintiffs; alternatively, they contended that if the section did impose any such statutory duty it was not actionable at the suit of any of the plaintiffs. The defendants did not admit that any of the acts alleged constituted unlawful competition with the plaintiffs in the way of trade, and, alternatively, contended that if such acts did constitute such unlawful competition the same was not relevant to any cause of action known to English law.

By an order dated June 30, 1959, and made on the defendants' application, the following points of law were ordered to be set down for hearing in the non-witness list and disposed of before the trial of the action, pursuant to R.S.C., Ord. 25, rr. 2 and 3, and Ord. 36, r. 1: (a) that assuming the truth of paragraphs 1 and 2 of the statement of claim, if the defendants had, as alleged in paragraph 3 thereof, passed off or threatened or intended to pass off as or for champagne wine not produced by the plaintiffs in the Champagne district from grapes grown in the Champagne district and supplied by the plaintiffs to England and Wales, they had not thereby done any act in respect of which any of the plaintiffs had a cause of action against them according to the law of England; (b) that section 2 (2) of the Merchandise Marks Acts, 1887 to 1953, did not impose any statutory duty on the defendants, or any statutory duty owed by the defendants to the plaintiffs and, alternatively, if the said section did impose any such statutory duty, it was not in law actionable at the suit of any of the plaintiffs or at all; and (c) that the allegation in paragraph 5 of the statement of claim that the acts of the defendants constituted unlawful competition was insufficient to support any cause of action known to English law.

R. O. Wilberforce Q.C., *P. J. Stuart Bevan*, *R. K. Kuratowski* and *E. G. Nugee* for the plaintiffs. Although this is the defendants' application it is more convenient for the plaintiffs to make their submissions first. It is agreed that points of law (a) and (c) are related. The question for determination is whether it is part of English law that where a number of persons produce goods in a defined geographical area which become known by the name of the area and as such acquire a reputation, those persons have a civil remedy against other persons producing goods outside the area who attach its name to their goods. If the plaintiffs are able to establish the facts pleaded in the statement of claim, the defendants are carrying on a trade with which a court of equity can deal by way of injunction. There is no conclusive authority either for or against our contention.

The court is here concerned not with a fancy or inventive name, nor with a descriptive name which cannot be appropriated by any particular person, but with a geographical name which is more analogous to a proper name; as against another person with the same name no individual has an exclusive right to its use in the absence of fraud, but a person can stop another from assuming his name for the purpose of trading with it. Geographical names are more complicated, for they may not be truly geographical at all, such as Jerusalem artichokes, or become generic, such as Wilton carpets, or acquire a secondary meaning which becomes identified with a particular product, such as Yorkshire relish. "Champagne" is a true geographical name, and such a name, particularly where it is attached to a natural product such as wine, constitutes possibly the most valuable part of the goodwill of the person whose business it is. The right to use the name through being in the geographical area is part of the goodwill. The defendants have said that this action does not comply with the requirements of a passing-off action, as there are not the usual allegations of passing off as and for the goods of the plaintiffs, but that is nihil ad rem as causes of action are not dispensed on a pigeon-hole basis but are simply an invention of the courts useful in dealing with particular situations.

Passing-off actions at common law were founded on misrepresentation or deceit, and in equity on injury to property; both elements are present here. There are two views as to the nature of the property to be protected: (1) a property in the name itself which is non-exclusive; or (2) a property in the goodwill arising from the name. In *A. G. Spalding & Brothers* v. *A. W. Gamage*[2] Lord Parker preferred the second view, but he left the question open. See also dicta of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ltd.*[3] and of Goddard L.J. in *Draper* v. *Trist.*[4]

If there were only one plaintiff alleging that the description applied to his wine, he would be able to bring a passing-off action, and it is illogical and contrary to the general interest to say that a number of persons cannot bring an action but that they can do so if formed into a corporation; none of the English cases is decisive. [Reference was made to *Dent* v. *Turpin*[5]; *Southorn* v. *Reynolds*[6]; *Weller* v. *Baker*[7]; *Hannay & Co.* v. *Smurthwaite*[8]; *The Free Fishers and Dredgers of Whitstable* v. *Elliott*,[9] and *Dunnachie* v. *Young & Sons*,[10] a Scottish case.] The form of injunction granted in *Braham* v. *Beachim*[11] shows that the right is non-exclusive to persons within the area.

New York and R. Cement Co. v. *Coplay Cement Co.*[12] puts the defendants' argument in its strongest form, but the reasoning is false, since it likens a private wrong to a public wrong; a private wrong is privately redressed and it does not become public because many are injured. *Pillsbury-Washburn Flour Mills Co. Ltd.* v. *Eagle*[13] is good law; it is based on English and Scottish as well as American cases and the facts were broadly similar to those of the present case; it was followed in another American case, *California Fruit Canners' Association* v. *Myer.*[14] It is not contended that there is any general right to restrain competition which is recognised as not contrary to public policy, but there comes a point, as in this case, at which it becomes unlawful because of the elements of misrepresentation and injury to property: *Mogul Steamship Co.* v. *McGregor, Gow & Co.*[15]

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[2] (1915) 32 R.P.C. 273, 284; 31 T.L.R. 328.

[3] [1932] 1 Ch. 201, 210; 48 R.P.C. 580.

[4] [1939] 3 All E.R. 513, 526; 56 R.P.C. 429.

[5] (1861) 2 J. & H. 139.

[6] (1865) 12 L.T. 75.

[7] (1769) 2 Wils.K.B. 414.

[8] [1893] 2 Q.B. 412.

[9] (1888) 4 T.L.R. 273.

[10] (1883) 10 R.(Ct. of Sess.) 874.

[11] (1878) 7 Ch.D. 848.

[12] (1890) 44 Fed.Rep. 277.

[13] (1898) 86 Fed.Rep. 608.

As to point of law (b), the following questions must be considered: (1) Do the Merchandise Marks Acts create a statutory duty? (2) Is the duty for the benefit of a class of which the plaintiff is a member? (3) Does the existence of a penalty preclude a civil remedy? [Reference was made to *Cutler* v. *Wandsworth Stadium Ltd.*[16]; *Monk* v. *Warbey*[17]; *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*,[18] and *Square* v. *Model Farm Dairies* (*Bournemouth*) *Ltd.*[19]] The Acts are directed against the deception of the public and also against injury to owners of trade marks and trade descriptions; there are cases in which individuals might suffer more serious damage than the public, and private interest was not intended to be excluded from remedy. In two Irish cases, *Thwaites & Co.* v. *M'Evilly*[20] and *J. Donohoe Ltd.* v. *Cherry Brothers Ltd.*,[21] an injunction was sought for breach of the Merchandise Marks Act, it being granted in the former.

The wording of section 2 (2) of the Act of 1887 shows that a prosecutor is able to take further proceedings, namely, to bring a civil action.

[Danckwerts J. I thought that that enabled a prosecutor to go after the true offender and not the innocent trader.]

That may be, but private prosecutions are commonly brought: see *Kat* v. *Diment.*[22] The wording of section 2 (2) does not prevent a statutory duty from arising. The form of the section is less important than the intention of the whole statute; the class of persons entitled to use the trade descriptions are within the class of persons to be protected. The existence of a penalty is not exclusive of other remedies; particularly in the case of an injunction, that remedy ought to lie irrespective of the right to damages: *Cooper* v. *Whittingham.*[22a]

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[14] (1899) 104 Fed.Rep. 82.

[15] (1889) 23 Q.B.D. 598.

[16] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[17] [1935] 1 K.B. 75; 51 T.L.R. 77.

[18] [1923] 2 K.B. 832; 39 T.L.R. 530.

[19] [1939] 2 K.B. 365; 55 T.L.R. 384; [1939] 1 All E.R. 259.

[20] [1904] 1 I.R. 310; 21 R.P.C. 397.

[21] (1908) 26 R.P.C. 545.

[22] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.

[22a] (1880) 15 Ch.D. 501.

1959

J. BOLLINGER
v.
COSTA BRAVA
WINE CO.
LTD.

Sir Milner Holland Q.C., *F. E. Skone James* and *S. H. Noakes* for the defendants. The plaintiffs' argument tends to show that the foundation of the action is not in the appropriation of the name but of the goodwill. The plaintiffs have acquired a high reputation not because they make champagne but because they make good wine; since champagne is not a natural product, a high reputation does not attach to all makes. In *A. G. Spalding & Brothers* v. *A. G. Gamage Ltd.*[23] the defendants' acts involved linking inferior goods with the plaintiffs' goods, and the action was maintainable, since the sale by the defendants was likely to cause confusion in the mind of the public, whereas in this case the plaintiffs do not contend that there is a linking of the defendants' goods with their goods. *Samuelson* v. *Producers' Distributing Co. Ltd.*[24] and *Draper* v. *Trist*[25] were also cases of interference with the name or description of the goods of a particular trader. *Dent* v. *Turpin*,[26] *Southorn* v. *Reynolds*,[27] *Braham* v. *Beachim*[28] and *The Free Fishers and Dredgers of Whitstable* v. *Elliott*[29] were all clear cases of passing off in the sense disclaimed by the plaintiffs and do not establish that a person whose goods have a geographical name can stop others from using the name; and *Weller* v. *Baker*[30] has little bearing on the question.

The description "champagne" has come to mean a particular kind of wine produced by a special process and as such can be used by producers outside the area: *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.*[31] *Jamieson & Co.* v. *Jamieson*[32] shows that an action such as the present will only succeed if it is shown that the plaintiff's individual reputation is affected by the conduct of the defendant.

Even if a defendant acts unlawfully and the plaintiff is injured thereby, it does not follow that the court should interfere at the plaintiff's suit: *Institute of Patent Agents* v. *Lockwood*[33]; *Abbott* v. *Sullivan*.[34] For a defendant to say that his goods are better than the plaintiff's, even if the statement is false and injurious to the plaintiff, does not mean that an action will lie: *Hubbuck & Sons Ltd.* v. *Wilkinson, Heywood & Clark Ltd.*[35] A plaintiff must be able to show that the defendant's acts fall within the recognised category of legal wrongs; all that the defendants here have done is to describe their wine as champagne.

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[23] 32 R.P.C. 273.

[24] [1932] 1 Ch. 201.

[25] [1939] 3 All E.R. 513.

[26] 2 J. & H. 139.

[27] 12 L.T. 75.

[28] 7 Ch.D. 848.

[29] 4 T.L.R. 273.

[30] 2 Wils.K.B. 414.

[31] 17 R.P.C. 461.

[32] (1898) 14 T.L.R. 160.

[33] [1894] A.C. 347.

[34] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[35] [1899] 1 Q.B. 86; 15 T.L.R. 29.

American law as stated in the Restatement of the Law of Torts, vol. 4, is wider than English law; the pleading in *Pillsbury-Washburn Flour Mills Co. Ltd.* v. *Eagle* [36] was based on passing off and the court relied on ordinary passing-off cases.

Whether there has been a breach of a statutory duty is only relevant where an Act of Parliament imposes a duty and the plaintiff was within the class of persons whom the Act seeks to protect: *Cutler* v. *Wandsworth Stadium Ltd.*[37]; *Solomons* v. *R. Gertzenstein Ltd.*[38]; *Groves* v. *Wimborne (Lord)* [39]; *Britannic Merthyr Coal Co.* v. *David* [40]; *Dawson & Co.* v. *Bingley Urban District Council* [41]; *Black* v. *Fife Coal Co. Ltd.*[42]; *Read* v. *Croydon Corporation* [43]; *Lavender* v. *Diamints Ltd.*[44]; *Monk* v. *Warbey.*[45] The Merchandise Marks Acts were not passed for the benefit of rival traders. It must be considered whether the Act in question intended that there should be a civil remedy, and the nature and extent of any penalty are material. The Merchandise Marks Acts are public general Acts and do not contemplate a civil remedy; at common law the purchaser has a remedy for misrepresentation, and a competing trader has a remedy for passing off; section 19 of the Act of 1887 preserved these remedies. The broad principle is that, if there is no penalty in the statute, an action will lie, but if the penalty is severe, there is no other remedy: *London Armoury Co. Ltd.* v. *Ever Ready Co. (Great Britain) Ltd.*[46] In *Thwaites & Co.* v. *M'Evilly* [47] and *J. Donohoe Ltd.* v. *Cherry Brothers Ltd.*[48] the court assumed without deciding that the Acts created a civil right of action. An injunction will only lie in aid of a right of property, but the plaintiffs have no such right: *Attorney-General* v. *Ashborne Recreation Ground Co.*[49]; *Devonport Corporation* v. *Tozer* [50]; *Cooper* v. *Whittingham* [51]; *Stevens* v. *Chown.*[52]

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[36] 86 Fed.Rep. 608.

[37] [1949] A.C. 399.

[38] [1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625.

[39] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[40] [1910] A.C. 74.

[41] [1911] 2 K.B. 149; 27 T.L.R. 308.

[42] [1912] A.C. 149; 28 T.L.R. 150.

[43] (1938) 55 T.L.R. 212; [1938] 4 All E.R. 631.

[44] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.

[45] [1935] 1 K.B. 75.

[46] [1941] 1 K.B. 742; 57 T.L.R. 343; [1941] 1 All E.R. 364.

[47] [1904] 1 I.R. 310.

[48] 26 R.P.C. 545.

[49] [1903] 1 Ch. 101; 19 T.L.R. 39.

[50] [1903] 1 Ch. 759.

[51] (1880) 15 Ch.D. 501.

[52] [1901] 1 Ch. 894; 17 T.L.R. 313.

R. O. Wilberforce Q.C. in reply. The fact that relief has been given where there has been a breach of a positive duty does not mean that it will be given in those cases alone: *London Armoury Co. Ltd.* v. *Ever Ready Co. (Great Britain) Ltd.*[53]; *Dawson & Co.* v. *Bingley Urban District Council*[54]; *Chamberlaine* v. *Chester and Birkenhead Railway Co.*[55]; *Carlton Illustrators* v. *Coleman & Co. Ltd.*[56]

There are three classes of persons for whose benefit the Acts were passed: the general public, purchasers of goods and manufacturer of goods. Section 17 of the Act of 1887 introduced into a contract of sale an implied warranty that a trade description which has been applied to goods is not false. The severity of a penalty is not conclusive against a right to bring a civil action. The Merchandise Marks Act, 1926, was public interest legislation and the *London Armoury Co. Ltd.* case[57] was based solely upon that Act. The relevant legislation is the Act of 1887 as amended in 1953.

A full right of property does not have to exist for the granting of an injunction, but it will be granted to prevent an illegal act which is threatened from being done: *per* Jessel M.R. in *Cooper* v. *Whittingham*[58]; *Attorney-General* v. *Ashborne Recreation Ground Co.*[59] It does not follow from the Merchandise Marks Acts that the creation of a right in property is necessary. It is necessary to show that the Acts are for the benefit of the plaintiff amongst others, and then it is sufficient if there is a mere breach for an injunction to be granted to prevent future breaches; it would be narrowing the law if it became necessary to show that a full right of property existed. By statute an injunction will lie for infringement of a trade mark, and the Acts put trade marks and trade descriptions on the same basis. Moreover, an injunction will lie in every case where a personal as opposed to a public right is infringed: *Institute of Patent Agents* v. *Lockwood.*[60]

Cur. adv. vult.

November 13. DANCKWERTS J. read the following judgment, which after referring to the statement of claim, the defence and the points of law continued: It appeared from the arguments before me that the points of law (a) and (c) were, in substance, part of the same cause of action relied upon by the defendants, so that there were really only two points of law to be decided.

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[53] [1941] 1 K.B. 742.

[54] [1911] 2 K.B. 149.

[55] (1848) 1 Exch. 870; 11 L.T.O.S. 270.

[56] [1911] 1 K.B. 771; 27 T.L.R. 65.

[57] [1941] 1 K.B. 742.

[58] 15 Ch.D. 501, 507.

[59] [1903] 1 Ch. 101.

[60] [1894] A.C. 347.

It appears, therefore, that, if the points of law are decided entirely against the plaintiffs, this will bring the action to an end; but, if any of the points of law are decided in the plaintiffs' favour, it does not necessarily follow that the action will succeed, because, on the facts, it will still be open to the defendants to show that they have not been guilty of any sort of passing off and that the description used by them for their wine is not a false trade description or otherwise contrary to the provisions of the Merchandise Marks Acts, 1887 to 1953. I am not deciding these questions of fact and evidence at this hearing, and I am not concerned with the question whether the plaintiffs are entitled to sue on behalf of all the wine producers in the Champagne district of France.

It is desirable, I think, to state in a clear form the assumptions upon which the arguments proceeded. These are the assumptions: (1) The plaintiffs carry on business in a geographical area in France known as Champagne; (2) the plaintiffs' wine is produced in Champagne and from grapes grown in Champagne; (3) the plaintiffs' wine has been known in the trade for a long time as "champagne" with a high reputation; (4) members of the public or in the trade ordering or seeing wine advertised as "champagne" would expect to get wine produced in Champagne from grapes grown there; and (5) the defendants are producing a wine not produced in that geographical area and are selling it under the name of "Spanish Champagne."

It was admitted on behalf of the plaintiffs that the action was not a "passing-off action" in the sense that there was any allegation that the defendants' product was passed off as wine produced by any of the plaintiffs individually. The plaintiffs' first contention (which is the subject of points (a) and (c)) is that where a number of persons produce goods in a geographical area and these goods become known by the name of the geographical area and, as such, acquire a reputation, persons who produce similar goods outside the geographical area and attach the name of the geographical area to their goods are guilty of what is described in paragraph 5 of the statement of claim as "unlawful competition" and are passing off their goods as the goods of other persons in a way which the law prohibits. It was said that the name "champagne" was part of the plaintiffs' goodwill which was injured by the defendants' conduct and that the law was not so limited as to deprive persons so injured of a right of action to protect their property, and that it is not an objection that the plaintiffs have no exclusive right to the name "champagne" in the sense that they share the right to use it with all other persons who produce wine in the Champagne area.

The defendants, on the other hand, claim that the plaintiffs' case could not come within the well-settled ambit of a passing-off action, and contended that the law did not provide a civil remedy for such matters as were the subject of the plaintiffs' complaint.

On the assumptions which have to be made for the purpose of these arguments (which, as I have pointed out, do not necessarily represent the true facts of the case), the taking of the name of a product which is associated with growers in a different district appears, prima facie, to be a reprehensible course of conduct, but whether it is actionable must depend upon principle and the authorities which are relevant. A very large number of cases, as well as textbooks, were cited to me in argument.

The well-established action for "passing-off" involves the use of a name or get-up which is calculated to cause confusion with the goods of a particular rival trader, and I think it would be fair to say that the law in this respect has been concerned with unfair competition between traders rather than with the deception of the public which may be caused by the defendant's conduct, for the right of action known as a "passing-off action" is not an action brought by the member of the public who is deceived but by the trader whose trade is likely to suffer from the deception practised on the public but who is not himself deceived at all.

This aspect seems to me to be obscured in the passage in Clerk and Lindsell on Torts (1954), 11th ed., p. 2, to which I was referred: "An action at common law lay for 'passing-off' " where there was an intent to deceive on analogy to an action " for fraud, but unless the plaintiff proved that there was an " intent to deceive no action lay. In equity, however, an in" junction could be obtained to restrain the defendant from " continuing a practice that was calculated to deceive, although " there was no proof of an intent to deceive. Damages was not " a remedy available in equity, but where the defendant had " full knowledge of all the facts equity treated him as if he had " an intention to deceive, and in such a case directed against " him an account of profits arising from his fraud, but only from "the date of his knowledge. Accordingly, where the 'passing-"'off' was entirely innocent on the part of the defendant, who "desisted so soon as the facts were brought to his notice, the "plaintiff had no remedy by way of injunction and none for an "account of profits. At common law no action would lie at all, "but had there been a deceit an action would lie independently "of proof of damage, though only nominal damages might be "obtainable. It will, therefore, be observed that there were two "different causes of action, one arising from deceit and the other "from an equitable quasi-property. Under the dual administra-"tion of law and equity since 1873 this fact seems to have been "obscured, so that as long ago as 1915 it could be suggested that "nominal damages would lie for an innocent passing-off. It is "not suggested that the present law is less logical than the old, "but this confusion has left a legacy in the uncertainty which "surrounds the true nature and extent in this 'quasi-property' "in a trade description or name or, perhaps, goodwill."

The last few words seem to me to be truly related to the nature of the "passing-off" action, but nowhere in that passage is the point made clear that the plaintiff is not deceived; he has caught the defendant deceiving other persons by pretending that his goods are those of the plaintiff. The point is that the deception is injuring the plaintiff's trade.

Winfield on Torts (1954), 6th ed., pp. 733 et seq., seems to me to approach the subject more correctly in regarding the cause of action as being an example of competition which is unlawful. After pointing out that, in general, trade competition is lawful, the author refers to the examples of unlawful competition, such as interference by threats or slander of title, and includes "passing-off," concluding that the basis of the proceedings is the protection of rights of property affecting the plaintiff's trade, for there is no right of action where there is no interference with a plaintiff's trade (see *Day* v. *Brownrigg*[1]—the "Ashford "Lodge" case). That difficulty does not arise in the present case. The whole basis of the plaintiffs' complaints is the damage which is alleged to be caused to the plaintiffs' trade in the wine called "champagne."

The view that the law is interfering to protect rights of property is clearly supported by the observations of Lord Parker in *A. G. Spalding & Brothers* v. *A. W. Gamage Ltd.*[2] (the "Orb" football case), where he says[3]: "There appears to be considerable "diversity of opinion as to the nature of the right, the invasion "of which is the subject of what are known as passing-off actions. "The more general opinion appears to be that the right is a right "of property. This view naturally demands an answer to the "question—property in what? Some authorities say property in "the mark, name or get-up improperly used by the defendant. "Others say, property in the business or goodwill likely to be "injured by the misrepresentation. Lord Herschell in *Reddaway* "v. *Banham*[4] expressly dissents from the former view; and if "the right invaded is a right of property at all, there are, I think, "strong reasons for preferring the latter view"; and Lord Parker points out[5] that the plaintiff was not the party deceived.

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[1] (1878) 10 Ch.D. 294.

[2] (1915) 32 R.P.C. 273; 31 T.L.R. 328.

The statements of Lord Parker and Lord Herschell are good enough for me; and the same view is supported by the statements of Romer L.J. in *Samuelson* v. *Producers' Distributing Co. Ltd.*,[6] and of Goddard L.J. in *Draper* v. *Trist*,[7] where he says[8]: "In "passing-off cases, however, the true basis of the action is that "the passing-off by the defendant of his goods as the goods of the "plaintiff injures the right of property in the plaintiff, that right "of property being his right to the goodwill of his business."

The plaintiffs claim that their goodwill in the name or description "champagne" is injured by the defendants' conduct. Sir Milner Holland, on behalf of the defendants, did not contest the correctness of the statements in those cases, but pointed out that each of them was a case of interference with the name or description of the goods of a particular trader. The issue still is whether an action lies at the suit of one or more traders who, as well as others, use or are entitled to use the particular name or description.

I was referred by Mr. Wilberforce on behalf of the plaintiffs to a number of English cases, which were admitted not to be decisive. The earliest of these is the strange case of "the "dippers," that is to say, *Weller* v. *Baker*.[9] This case related to medicinal springs at Tunbridge Wells, and by certain articles of agreement made between the lord of the manor and the free tenants it had been agreed that no person should be permitted to follow the employment of a "dipper" except persons who had been chosen by the homage at the courts baron and approved by the lord of the manor, preference being given to the wives, widows and daughters of the freehold tenants, the number being limited to twelve. These articles of agreement were confirmed by a statute of George II. The "dippers" were women who attended at the springs and delivered the water therefrom to persons resorting thereto, and the dippers were rewarded with gratuities for doing this. The defendant, Dorcas Baker, who, though chosen by the homage, was not approved by the lord of the manor, proceeded to dip water and to receive gratuities, and the action was brought by the six chosen dippers and their husbands claiming that the defendant's conduct deprived them of moneys which they would otherwise have received. It was held by the Court of King's Bench that an action on the case lay for the defendant's interference with the plaintiffs' "right of employment" (being both an injury and damage), and that all the dippers had properly joined in the action. The court certainly considered that the defendant's conduct was a tort, and it would appear that the plaintiffs' employment was regarded as a freehold right of property; but the case does not seem to be very close to the present problem.

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[3] 32 R.P.C. 273, 284.

[4] [1896] A.C. 199, 209; 12 T.L.R. 295; 13 R.P.C. 218.

[5] 32 R.P.C. 273, 283.

[6] [1932] 1 Ch. 201, 210; 48 R.P.C. 580.

[7] [1939] 3 All E.R. 513; 56 R.P.C. 429.

[8] [1939] 3 All E.R. 513, 526.

[9] (1769) 2 Wils.K.B. 414.

Dent v. *Turpin* [10] relates to the watchmakers who were concerned with the great clock at Westminster. E. J. Dent had three places of business, and when he died in 1853 he bequeathed two of the businesses to his stepson, Frederick Rippon, who subsequently took the name of "Dent," and the other to his stepson, Richard Dent. The testator always labelled his watches "Dent, "London." The defendants were watchmakers and exporters who had no connection with the name "Dent" at all, but labelled their watches "Dent, London." The plaintiff was the administratrix of Frederick Dent who herself had carried on his business. On demurrer it was argued that the plaintiff could not take proceedings without joining the administratrix of Richard Dent. Page-Wood V.-C. held that the plaintiff was entitled to succeed, observing that [11] "it is quite enough to aver, as the bill does, "that these articles were manufactured and marked with the "trade mark in question, without the consent of the plaintiff or "of the other person entitled to use the name of Dent." This was, of course, clearly a case of passing-off by using the plaintiff's mark, but it does appear to show that the plaintiff need not have an exclusive right to the mark if the defendant has no right to it at all.

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[10] (1861) 2 J. & H. 139.

[11] Ibid. 143.

Very much to the same effect is *Southorn* v. *Reynolds*.[12] One of two brothers who separately manufactured clay tobacco pipes at Broseley in Shropshire, and sold them under the name of "Southorn's Broseley pipes," in continuation of a business founded by their father, brought the action against the defendant, Reynolds, who was a pipe manufacturer in the City Road, London, and had no establishment at or any connection at Broseley, and, somewhat impudently, it would appear, sold his pipes in boxes conspicuously labelled "Reynold's purified clay pipes made by "Southorn, from Broseley." He had gone to Broseley to obtain someone of the name of "Southorn" and had taken into his employment an individual of that name who was simply an ordinary workman. Page-Wood V.-C., following his own decision in *Dent* v. *Turpin*,[13] granted an injunction, in spite of the objection taken that the plaintiff had not an exclusive right to the name. In this case both a surname and a geographical description were involved.

Braham v. *Beachim* [14] is of interest because the case concerns a name which was geographical. The defendants, who did not work a colliery in the parish of Radstock but did work seams of coal connected with the seams of coal in the parish of Radstock, called themselves "The Radstock Colliery Proprietors." The plaintiffs were the Dowager Countess Waldegrave and the trustees of her marriage settlement, and they worked all the coal in the parish of Radstock, with a small exception. Fry J. granted an injunction restraining the defendants, unless and until they should acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style used by them, or any other name or style signifying that the defendants were proprietors of any colliery at Radstock. The relevance of this case is weakened, however, because it appears that the order was really made on the basis that "The Radstock Colliery Proprietors" would be taken to refer to the plaintiffs' business, and, therefore, in substance, the case is one of ordinary passing off.

Now come the two oyster cases. In *The Free Fishers and Dredgers of Whitstable* v. *Elliott* [15] the plaintiffs were a company incorporated under a statute of George III, and were entitled to the soil of the marine manor of Whitstable, to the exclusive right of fishing therein, and also to the exclusive right of taking tolls from ships anchoring in the bay. The defendant, who was the contractor for the refreshment department of the Royal Courts of Justice, sold what he called " Whitstable native oysters " in the building at 2s. per dozen. The plaintiffs claimed that the only genuine Whitstable native oysters were those produced upon their beds, and alleged that the defendant's oysters were French oysters known in the trade as " seconds." It appeared that the oysters sold by the defendant came from the bed of the Sea Salter and Ham Oyster Co. at Whitstable, which were adjacent to those of the plaintiffs, but it also appeared that these oysters had not been born in the estuary of the Thames but on the coast of France, and had been laid down on the beds of the Sea Salter Co. until they arrived at maturity. Stirling J. found that the term " Whitstable native oysters " was not a proper description of the defendant's oysters. He said that the term " Whitstable " was properly applicable to any oysters matured at Whitstable, but that the term " native " meant oysters which came into being at a few places on the coast of Essex, and not only at Whitstable. So that " Whitstable native oysters " meant oysters matured at Whitstable, but also born there or at one of the places in Essex.

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[12] (1865) 12 L.T. 75.

[13] 2 J. & H. 139.

[14] (1878) 7 Ch.D. 848.

[15] (1888) 4 T.L.R. 273.

In a reserved judgment Stirling J. seems to have come to the conclusion that the name " Whitstable native oysters," primarily descriptive and geographical, had come to be the trade name of the plaintiffs, and he remarked that if the defendant or the Sea Salter Co., from whom he purchased, were selling oysters properly designated as " Whitstable native oysters " he could not have interfered. He felt suspicious about the conduct of the Sea Salter Co., but thought that the defendant might have acted in innocence. But, as the defendant declined to give an undertaking to discontinue the use of the name, an injunction was granted.

There is obviously some relevance in this case to the present, but I think that there is some justification for the comment of Sir Milner Holland that it was a case of ordinary passing off.

The other oyster case (to which my attention was called by Sir Milner Holland) is *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.*[16] The plaintiffs were, apparently, the same corporation as the plaintiffs in the earlier case, and they claimed that the proper word " Whitstable " in the trade description of oysters was confined to the plaintiffs and the Sea Salter Co. and indicated the oysters of one or other and no other. The plaintiffs complained that the defendants had recently taken to selling oysters, not those produced by the plaintiffs or the Sea Salter Co., as "Whitstables," "Whitstable natives, selected," and other similar names and were passing off these oysters as those cultivated or matured by the plaintiffs or the Sea Salter Co. The action was dismissed, and it appears that the result of the case turned entirely on the question whether the description "Whitstable "oysters" had acquired a secondary meaning, namely, either the plaintiffs' oysters or those of the Sea Salter Co.

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[16] (1900) 17 R.P.C. 461.

Buckley J. said [17]: "In all cases such as this the question "to be determined is one of fact, and what I have to try here "first is whether these words 'Whitstable natives,' or 'Whit-"'stable oysters,' which, according to their ordinary meaning "would convey oysters, or oysters of a kind, coming from "Whitstable, have a secondary meaning, by which the trade and "the public understand them to mean not simply that thing—"that class of goods—but certain goods which the plaintiffs only, "or the plaintiffs and the Sea Salter Company, supply. I answer "that question of fact by saying that the evidence satisfies me "that the words are understood by the trade to mean not the "plaintiff company's goods, or the Sea Salter Company's goods, "but a particular class of goods which are known in the trade "by that name."

Sir Milner Holland, very naturally, relied on this case, but I do not think that it is conclusive against the plaintiffs in the present case, because it appears to me that Buckley J. reached a finding of fact (which he stated and discussed [18]) which differs in nature from the assumptions of fact which I am required to make for the purposes of the present case, and he seems to have thought that the term meant merely a particular class of oysters having certain characteristics, which is not of the same kind as the assumption on which I have to act.

I turn now to the Scottish case, *Dunnachie* v. *Young & Sons.*[19] The pursuers, who were two separate firms, manufactured firebricks at the farm of Glenboig from fireclay on the farm and had registered trade marks "Glenboig" and "Star Works, Glen-"boig," with "J. D." and a star; and their firebricks had attained a great reputation at home and abroad. The defendants made firebricks from a seam of clay identical in character with the clay worked at Glenboig, but about two miles from Glenboig, and stamped their bricks "Youngs Glenboig," advertising them as made from Glenboig clay. The court granted an interdict; but it is plain that, apart from the fact that the two firms who had the right to use the word "Glenboig" for their firebricks were the pursuers, the case is simply a passing-off case. Though "Glenboig" was a geographical expression, it was the trade mark, in whole or in part, of each of the aggrieved firms.

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[17] 17 R.P.C. 461, 474.

[18] Ibid. 471, 475.

[19] (1883) 10 R. 874.

I must now deal with the three American cases to which I was referred. The first of these, *New York and R. Cement Co.* v. *Coplay Cement Co.*,[20] decided by two judges of the Federal Circuit Court in Pennsylvania, is in the defendants' favour. Some fifteen or twenty parties, including the plaintiffs, manufactured cement in the town of Rosendale, in the State of New York, and the cement made in Rosendale and its vicinity had for many years been known as "Rosendale Cement." The defendants were manufacturing and selling cement as "Anchor "Rosendale Cement," though it was made in Lehigh County, Pennsylvania. The court held that it was insufficient to show that the plaintiffs had a mere right in common with others to use a particular trade mark, trade name or style of goods, and it was necessary to show an exclusive ownership or property therein. The court did not review the authorities and said that they relied upon the general principles of the law which seemed to be the most applicable to the case. So the action failed. The court was oppressed with the difficulties which might arise if persons could bring actions in respect of such things as Dresden china or Irish linen, and thought it might "open a Pandora's "box of vexatious litigation." But the proposition of the need for exclusive right, as stated by the court, apart from the other American cases, seems to me to be at variance with the English cases *Dent* v. *Turpin*[21] and *Southorn* v. *Reynolds*.[22]

The next case, *Pillsbury-Washburn Flour Mills Co. Ltd.* v. *Eagle*,[23] a decision of three Federal judges on appeal from the Circuit Court of the Northern District of Illinois, is, in my view, irreconcilable with the last-mentioned case. This was an action by a number of manufacturers, including one, the one named in the case, which was an English company, who for many years had manufactured flour on a large scale at the city of Minneapolis in Minnesota. The defendants were wholesale and retail grocers, selling flour at Chicago, Illinois. The plaintiffs sought to stop them from using on barrels and sacks containing flour the words "Minnesota Patent" or "Minneapolis, Minnesota" or "Minneapolis, Minn." The plaintiffs had for many years identified their flour by the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," or "Minnesota Patent." The use of the words "Minnesota" or "Minnesota Patent" was understood by the trade and the public to mean flour made under a certain patent process somewhere in the State of Minnesota. Originally, before 1893, it appeared that the defendants had stocked and sold the plaintiffs' flour under the name and description used by them, but after 1893 proceeded to use the names and descriptions complained of for flour produced at Milwaukee, in Wisconsin, which was alleged to be inferior flour sold at a cheaper price.

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[20] (1890) 44 Fed.Rep. 277.

[21] 2 J. & H. 139.

[22] 12 L.T. 75.

[23] (1898) 86 Fed.Rep. 608.

The court, after an extensive examination of the authorities, including numerous English cases, and among them nearly all the leading English cases on ordinary passing off, came to the conclusion that an injunction ought to be granted, reversing the decision of the court below. A curious circumstance is that the *New York and R. Cement Co.* case[24] was referred to on an incidental point without any note of disapproval.

Sir Milner Holland sought to weaken the relevance of this case by reason of the court's reliance on a number of the ordinary cases of passing off and said that the pleading in the case was simply on the basis of passing off. Mr. Wilberforce's reply to this was to observe that the court was dealing with two propositions as it went through the cases, (1) that geographical expressions may constitute a trade description, and (2) that the plaintiffs need not have an exclusive right to use the trade description. The case is, of course, not binding upon me, and it was contended by Sir Milner Holland that it was not in accordance with English law.

The remaining American case is *California Fruit Canners' Association* v. *Myer*.[25] The headnote is: "Canning companies "in California, who put up and sell fruits grown in that state, "have the right to use thereon the name 'California' as a trade "designation, and, when their products have become well and "favourably known by such name, are entitled to protection by "injunction against the fraudulent use on cans of the same kind "of fruit, grown and put up elsewhere, of labels designating it

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[24] 44 Fed.Rep. 277.

[25] (1899) 104 Fed.Rep. 82.

"as California fruit, and falsely stating that it is put up in that "state." This fairly states the effect of the case, which was decided by a single Federal judge in the Circuit District of Maryland, and the short judgment follows the *Pillsbury-Washburn Flour Mills* case.[26]

Sir Milner Holland contended that the mere fact that a defendant's conduct is injurious to the plaintiff or even, maybe, unlawful, does not necessarily give the plaintiff a cause of action; and no doubt this is true in certain circumstances. He relied upon (amongst other cases) *Institute of Patent Agents* v. *Lockwood*,[27] in which the Institute of Patent Agents and three registered patent agents practising in Glasgow sought to prevent the defender describing himself as a patent agent, and were held not entitled to an injunction. But this case has probably more relevance on the question relating to the Merchandise Marks Act and is not of assistance on the present point.

Another instance of loss being caused without the person so damnified being entitled to a remedy is *Abbott* v. *Sullivan*,[28] to which I was also referred; and there are, of course, the examples of mere extravagance of language which are recognised as part of everyday life, such as " the puffing " cases, an instance of which is *Hubbuck & Sons Ltd.* v. *Wilkinson, Heywood & Clark Ltd.*[29]

The substance of Sir Milner Holland's argument was that, before a person can recover for loss which he suffered from another person's act, it must be shown that his case falls within the class of actionable wrongs. But the law may be thought to have failed if it can offer no remedy for the deliberate act of one person which causes damage to the property of another. There are such cases, of course, but they occur, as a rule, when the claims of freedom of action outweigh the interests of the other persons who suffer from the use which a person makes of his own property. (For example, see *Day* v. *Brownrigg*[30] and *Mayor of Bradford* v. *Pickles*.[31])

There seems to be no reason why such licence should be given to a person, competing in trade, who seeks to attach to his product a name or description with which it has no natural association so as to make use of the reputation and goodwill which has been gained by a product genuinely indicated by the name or description. In my view, it ought not to matter that the persons truly entitled to describe their goods by the name and description are a class producing goods in a certain locality, and not merely one individual. The description is part of their goodwill and a right of property. I do not believe that the law of passing off, which arose to prevent unfair trading, is so limited in scope. In my view, the decision in the *Pillsbury-Washburn Flour Mills* case [32] is good sense, and I find nothing in the English cases which is at all inconsistent with the reasoning of the American court, except possibly some of the remarks of Buckley J. in *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries Ltd.*,[33] which, I think, related to the particular circumstances of the trade in oysters in those cases.

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[26] 86 Fed.Rep. 608.

[27] [1894] A.C. 347.

[28] [1952] 1 K.B. 189; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[29] [1899] 1 Q.B. 86; 15 T.L.R. 29.

[30] 10 Ch.D. 294.

[31] [1895] A.C. 587; 11 T.L.R. 555.

I think that the law should and does provide a remedy for the type of unfair competition which is set out in paragraph (a) of the points of law; but I wish to emphasise again that this conclusion is based upon the assumptions of fact which I am required to make for the purpose of the present hearing, and I must not be taken to have accepted in any other way the allegations that what the defendants have been doing causes or is likely to cause any confusion with the wine produced in the Champagne district of France. I think that it is desirable to state this, lest persons who have not followed the basis of the present hearing should be under misapprehension as to the effect of my decision. In short, I am not deciding whether the description "Spanish "Champagne" is calculated to deceive.

I turn now to the point depending upon the Merchandise Marks Acts, 1887 to 1953. It is desirable to see what the Acts do. The really relevant Act is the Act of 1887. Section 2 creates offences as to trade marks and trade descriptions. It provides "(1) every person who—(*a*) forges any trade mark; or "(*b*) falsely applies to goods any trade mark or any mark so "nearly resembling a trade mark as to be calculated to deceive; "or (*c*) makes any die, block, machine, or other instrument for "the purpose of forging, or of being used for forging, a trade "mark; or (*d*) applies any false trade description to goods; or "(*e*) disposes of or has in his possession any die, block, machine, "or other instrument for the purposes of forging a trade mark; "or (*f*) causes any of the things above in this section mentioned "to be done, shall, subject to the provisions of this Act, and "unless he proves that he acted without intent to defraud, be

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[32] 86 Fed.Rep. 608.

[33] 17 R.P.C. 461.

"guilty of an offence against this Act." Paragraph (*d*) is the material paragraph for the purposes of the present case.

Subsection (2) contains ancillary provisions relating to the exposure of offending things for sale. Subsection (3) contains the penalties for offences, which are severe, being on conviction on indictment imprisonment for a term not exceeding two years, or a fine, or both imprisonment and fine, and up to four months' imprisonment or a £20 fine on summary conviction, with increased penalties on summary conviction for second or subsequent offences.

Among the definitions in section 3 (1) of "Trade description" is "any description, statement, or other indication, direct or "indirect, . . . (*b*) as to the place or country in which any "goods were made or produced, or (*c*) as to the mode of manu-"facturing or producing any goods, or (*d*) as to the material of "which any goods are composed. . . . The expression 'false "'trade description' means a trade description which is false "or misleading in a material respect as regards the goods to "which it is applied, . . ." The words "or misleading" were added by the Act of 1953.

It is not necessary to set out all the provisions of the Act, but section 17 may be noted, as it provides that on the sale or in the contract for the sale of any goods the vendor shall be deemed to warrant that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

In section 19, there is a saving provision that the Act shall not exempt any person from any action, suit or other proceeding which might, but for the provisions of this Act, be brought against him.

There have been a very large number of decisions on the question whether a duty is imposed by a statute so as to create a civil cause of action. In *Cutler* v. *Wandsworth Stadium Ltd.*[34] the principles are described by Lord Simonds as follows[35]: "The only rule which in all circumstances is valid is that the "answer must depend on a consideration of the whole Act and "the circumstances, including the pre-existing law, in which it "was enacted. But that there are indications which point with

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[34] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[35] [1949] A.C. 398, 407, 408.

"more or less force to the one answer or the other is clear "from authorities which, even where they do not bind, will "have great weight with the House. For instance, if a statutory "duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right "of civil action accrues to the person who is damnified by the "breach. For, if it were not so, the statute would be but a "pious aspiration. But 'where an Act' (I cite now from the "judgment of Lord Tenterden C.J. in *Doe* v. *Bridges* [36]) 'creates "'an obligation, and enforces the performance in a specified "'manner, we take it to be a general rule that performance "'cannot be enforced in any other manner.' This passage was "cited with approval by the Earl of Halsbury L.C. in *Pasmore* "v. *Oswaldtwistle Urban District Council.*[37] But this general "rule is subject to exceptions. It may be that, though a specific "remedy is provided by the Act, yet the person injured has a "personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black* v. *Fife Coal* "*Co. Ltd.*[38] 'If the duty be established, I do not think there "'is any serious question as to the civil liability. There is no "'reasonable ground for maintaining that a proceeding by way of "'penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *Newcastle and* "'*Gateshead Waterworks Co.*[39] and by Lord Herschell in *Cowley* "'v. *Newmarket Local Board* [40] solves the question. We are "'to consider the scope and purpose of the statute and in "'particular for whose benefit it is intended. Now the object "'of the present statute is plain. It was intended to compel "'mine owners to make due provision for the safety of the "'men working in their mines, and the persons for whose "'benefit all these rules are to be enforced are the persons "'exposed to danger. But when a duty of this kind is imposed "'for the benefit of particular persons, there arises at common "'law a correlative right in those persons who may be injured "'by its contravention.' An earlier and a later example of the "application of this principle will be found in *Groves* v. *Wimborne* "*(Lord)* [41] and *Monk* v. *Warbey* [42] in the former of which cases

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[36] (1831) 1 B. & Ad. 847, 859.

[37] [1898] A.C. 387, 394; 14 T.L.R. 368.

[38] [1912] A.C. 149, 165; 28 T.L.R. 150.

[39] (1877) 2 Ex.D. 441, 448.

[40] [1892] A.C. 345, 352; 8 T.L.R. 788.

[41] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[42] [1935] 1 K.B. 75; 51 T.L.R. 77.

" the Act in question was described by A. L. Smith L.J. [43] as " ' a public Act passed in favour of the workers in factories and " ' workshops to compel their employers to do certain things for " ' their protection and benefit.' "

In *Cutler* v. *Wandsworth Stadium Ltd.*,[44] however, the statute, which required the provision of space for bookmakers at dog-racing tracks, was held not to give a cause of action to an individual bookmaker against the occupier of a licensed dog-racing track.

The principles discussed have often been applied, and I do not think that there is any advantage in going through the circumstances of the cases in which the result has either been the one way or the other. Looking at the Merchandise Marks Acts, 1887 to 1953, as a whole and considering the other provisions of the Acts, as well as the provisions to which I have referred specifically, I do not find it possible to reach the conclusion that the statutes give a rival trader a civil right of action. If the Act had the protection of any class of persons in mind I think it was the purchasers of goods which might be misleadingly described. But I do not think that the Acts give a civil cause of action to anyone, except where expressly provided. The severe penalties contained in the Acts are, in my view, the remedies provided by the Acts, apart from specific provisions in particular cases. For instance, section 17 of the 1887 Act gives to a purchaser a right of action for breach of warranty, which would appear to be unnecessary if the other provisions of the Act already gave a cause of action. Moreover, both rival traders in a passing-off action and purchasers of goods in an action based on deceit have rights of action apart from these statutes and those rights are carefully preserved by section 19 of the Act of 1887.

I was referred by Mr. Wilberforce to two Irish cases in which relief was obtained by rival traders in a civil action based on the provisions of the Merchandise Marks Act, 1887. These are *Thwaites & Co.* v. *M'Evilly* [45] and *J. Donohoe Ltd.* v. *Cherry Brothers Ltd.*[46] But in these cases it seems to have been assumed that the statute created a civil right of action, and I do not think that I can treat them as deciding the point which I have to decide.

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[43] [1898] 2 Q.B. 402, 406.

[44] [1949] A.C. 398.

[45] [1904] 1 I.R. 310; 21 R.P.C. 397.

[46] (1908) 26 R.P.C. 545.

In my view, therefore, the answer on point (b) must be that the Acts do not impose any statutory duty on the defendants which enables the plaintiffs to bring an action against them.

Order accordingly.
Leave to appeal to both sides.
Costs to be costs in the action.

Solicitors: *Monier-Williams & Keeling; Summer & Co.*

M. G. T.

C. A.

1959
Oct. 6, 7,
8, 21.

Lord Evershed M.R., Sellers and Harman L.JJ.

In re LONSDALE WILLS TRUSTS.
LOWTHER *v.* LOWTHER.

[1958 L. No. 1449.]

Revenue—Estate duty—Incidence—Property not passing to executor—Dispensing power—Power to appoint jointure—Appointment of jointure "without any deduction"—Whether jointress liable to contribute a rateable part of estate duty exigible on death of tenant for life—"Any express provisions to the contrary"—"Free of "duty"—Meaning—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 14 (1).

The second Earl of Lonsdale, who died in 1872, by his will gave power to a tenant for life of the hereditaments thereby settled to appoint to any woman he might marry a rentcharge by way of jointure "not exceeding in the whole for any one such woman the "yearly sum of £1,500" to be charged on such hereditaments. The third earl, who died in 1876, gave a similar power to jointure, the yearly sum in this case being £5,000. The sixth earl by his marriage settlement made in 1923 first, in exercise of the power contained in the second earl's will, irrevocably appointed to his wife, in case she should survive him, "during the residue of her life the "yearly rent charge of £1,000 by way of jointure" to commence from his death "to be paid without any deduction (except for "succession duty if any)," and secondly, in exercise of the power contained in the third earl's will, he appointed in similar terms in favour of his wife a rentcharge of £1,000 to be increased to £3,000 if (as happened) he succeeded to the Earldom of Lonsdale "to be paid without any deduction (except for succession duty if "any)." The sixth earl having died, the question arose whether the jointures of £1,000 and £3,000, which then became payable to his widow, had to bear a rateable part of the estate duty payable on his death in respect of the settled estates charged with such jointures under section 14 (1) of the Finance Act, 1894,[1] or whether there was an "express provision to the contrary" which exempted the jointures from the liability to contribute to the duty:—

Held, (1) that if in an appointment of a jointure the formula "free of duty," or similar words, were used that was "an express "provision to the contrary" within the last words of section 14 (1) of the Finance Act, 1894, and, accordingly, that the appointments in the settlement of 1923 were so worded as to free the jointures from any deduction for estate duty (post, pp. 308, 311).

(2) That the appointment constituted the "disposition" within section 14 (1) and that the sixth earl had power under the wills of the second and third earls to appoint jointures free from any liability to contribute to the estate duty payable on his own death and, accordingly, the jointress was not liable to contribute in respect of her jointures to such duty (post, pp. 309–310, 311).

Per Harman L.J. When the person exercising the power of appointment adds the words "free of duty" or similar words he is not exercising that power; the exercise of the dispensing power merely relieves the donee of the extra liability created by section 14 (1) (post, p. 312).

In re Smith-Bosanquet, decd. [1940] Ch. 954; 56 T.L.R. 960; [1940] 3 All E.R. 519 and *In re Sebright* [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547 applied.

In re Keele Estates (*No. 2*) [1952] Ch. 603; [1952] 2 T.L.R. 149; [1952] 2 All E.R. 164 distinguished.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

William, second Earl of Lonsdale (hereinafter called "the "second earl"), by his will dated February 18, 1871, settled certain hereditaments in strict settlement on his sons and their issue successively, and he provided that it should be lawful for every person thereby made tenant for life of the hereditaments thereby devised in strict settlement "to appoint to any woman "whom he may marry or have married for her life or for any less "period any yearly rent charge or rent charges by way of jointure "and in bar or without being in bar of dower and free bench not "exceeding in the whole for any one such woman the yearly sum "of £1,500 to be charged upon all or any of the said manors and

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[1] Finance Act, 1894, s. 14 (1): "In the case of property which does "not pass to the executor as such, "an amount equal to the proper "rateable part of the estate duty "may be recovered by the person, "who being authorised or required to "pay the estate duty in respect of "any property has paid such duty, "from the person entitled to any "sum charged on such property, "(whether as capital or as an "annuity or otherwise,) under a disposition not containing any express "provision to the contrary."

"hereditaments hereinbefore devised in strict settlement as aforesaid and to be paid at such time and in such manner as to the "person for the time being exercising this present power shall "seem meet." The second earl died on March 4, 1872.

Henry, third Earl of Lonsdale (hereinafter called "the third "earl"), by his will dated February 7, 1876, devised in strict settlement certain hereditaments and he provided that it should be lawful for every person who was tenant for life of the hereditaments "either before or after he shall under this my will be "entitled to the possession or to the receipt of the rents and "profits of the same manors and hereditaments (but subject and "without prejudice to the uses and estates preceding the estate "of the person for the time being exercising this present power "and to the powers annexed to such preceding uses or estates and "to the uses or estates limited in exercise of such powers) by any "deed or deeds with or without power of revocation and new "appointment or by will or codicil to appoint to any woman whom "he may marry or have married for her life or for any less period "any yearly rent charge or rent charges by way of jointure and in "bar or without being in bar of dower and free bench not exceeding in the whole for any one such woman the yearly sum of "£5,000 to be charged upon all or any of the said manors and "hereditaments." The third earl died on August 13, 1876.

By a marriage settlement dated October 6, 1923, made by Lancelot Edward Lowther, who became the sixth Earl of Lonsdale (hereinafter called "the sixth earl") in consideration of his then intended marriage to the defendant, Sybil Beatrix, Countess of Lonsdale, in exercise of the power conferred on him by the second earl's will appointed to her, should she survive him, "during the residue of her life the yearly rentcharge of £1,000 by "way of jointure to be charged upon all the manors hereditaments "and premises now subject to the subsisting limitations of the said "will of the said William Earl of Lonsdale and to commence" from his death "and to be paid without any deduction (except for "succession duty, if any)." Further, in exercise of the power conferred on him by the will of the third earl, the sixth earl appointed to Sybil Beatrix in case she should survive him "during "the residue of her life the yearly rent charge of £1,000 and also "if the said Lancelot Edward Lowther should himself succeed to "the Earldom of Lonsdale the additional yearly rent charge of "£2,000 by way of jointure (making with the yearly rent "charge of £1,000 appointed as aforesaid under the said will of "the said William Earl of Lonsdale a total yearly sum of £4,000 "in the event of the said Lancelot Edward Lowther so succeeding "to the said earldom and a total yearly sum of £2,000 in the "event of his not so succeeding but of some issue of his succeeding thereto) the said rent charges of £1,000 and £2,000 "appointed by this present clause respectively to be charged upon "all the manors hereditaments and premises now subject to the "subsisting limitations of the said will of the said Henry Earl of "Lonsdale and to commence from" the death of the sixth earl.

The hereditaments settled by the wills of the second and third earls having been disentailed were by a settlement of October 5, 1936, resettled and were held, subject to prior interests, in the events which had happened, upon trust for the defendant, James Hugh William, seventh Earl of Lonsdale (hereinafter called "the "seventh earl"), for life, with remainder to his first and other sons in tail. The seventh earl had one son, the fourth defendant, Lord Lowther.

The sixth earl died on March 11, 1953, and estate duty at the rate of 50 per cent. became payable in respect of the settled properties.

By this summons the plaintiffs, as trustees of the wills of the second and third earls, asked (inter alia) whether, upon the true construction of such wills and of the appointments contained in the settlement of 1923, an amount equal to the proper rateable part of the estate duty payable on the death of the sixth earl on the property on which the rentcharge of £1,000 was charged, and on the property on which the rentcharge of £3,000 was charged was recoverable by the trustees of the wills from the jointress, the defendant, Sybil Beatrix, Countess of Lonsdale.

The defendants to the summons were the jointress, the seventh earl and Lord Lowther.

Vaisey J. held that the appointments in the settlement of 1923 were valid, and the jointress took her jointure free from any liability to contribute.

J. Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the appellants, the seventh earl and Lord Lowther. The question is whether a tenant for life under a settlement, who has power to appoint a jointure of a stated amount, can appoint that amount free of estate duty. Vaisey J. followed Bennett J.'s decision in *In re Smith-Bosanquet*[2] and held that the tenant for life could appoint free of duty. It is submitted that *In re Smith-Bosanquet*[2] is irreconcilable with the decision of this court in *In re Keele Estates (No. 2)*.[3] On the death of the tenant for life it is necessary first to ascertain the beneficial interests which then come into operation in respect of the settled property, and then to apportion the duty rateably between those interests. Where an annuity is charged on settled property, the annuitant has to bear the interest on the duty attributable to the capital required to produce the annuity on the principle laid down in *In re Parker-Jervis*.[4] If the annuitant were to take free of any liability to contribute to the duty, the whole would have to be borne by the person entitled subject to the annuity. The effect of a gift free of duty is to give to the donee a larger share of the fund. It is clear that a settlor can lawfully and effectually himself provide that a deferred annuity shall be paid free of duty. Such a provision would be "an express provision to the contrary" within section 14 (1) of the Finance Act, 1894. He can also give power to the tenant for life to appoint a jointure free of duty. On the other hand, it is submitted that, if the settlement merely empowers the tenant for life to appoint a jointure of a stated amount, then it is not open to the tenant for life to appoint that amount free of duty. Such an appointment is in excess of the power.

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[2] [1940] Ch. 954; 56 T.L.R. 960; [1940] 3 All E.R. 519.

In re Keele Estates (No. 2)[5] was a case dealing with portions. This court did not there say in terms that the *Smith-Bosanquet* case[6] was wrong. *Lady Londonderry* v. *Wayne*[7] supports the view that a jointure cannot be appointed free of duty. In *In re Orford (Countess)*[8] the sum was a capital sum and section 14 applied. The *Parker-Jervis* case[9] has been regularly applied and a jointress treated as tenant for life of a slice of the estate. The duty is payable out of the capital and the jointress bears the interest on the duty attributable to her slice of the estate.

In the *Smith-Bosanquet* case[10] the jointure was treated as being charged on a tax-free estate. If the jointress takes under the appointment more than the named sum, she gets more than the power authorises; *Smith-Bosanquet*[10] was followed in *In re Sebright*.[11] The question is whether the donee of the power of appointment has power to appoint free of duty and to exclude the apportionment provisions of section 14. It is submitted that he cannot do so. The appointment has to be written back into the settlement.

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[2] [1940] Ch. 954.

[3] [1952] Ch. 603; [1952] 2 T.L.R. 149; [1952] 2 All E.R. 164.

[4] [1898] 2 Ch. 643.

[5] [1952] Ch. 603.

[6] [1940] Ch. 954.

[7] (1763) 1 Amb. 424.

[8] [1896] 1 Ch. 257.

[9] [1898] 2 Ch. 643.

[10] [1940] Ch. 954.

[11] [1944] Ch. 287.

In the *Keele* case [12] the Court of Appeal rejected the argument that a power to appoint a portion conferred power to appoint a net sum free of duty. The reasoning of that decision applies equally to a power to appoint a jointure. It was there held that a power did not authorise the appointor to contract out of section 14. The *Keele* case [12] was inconsistent with *Smith-Bosanquet*,[13] and that case must be regarded as, in effect, overruled. The *Keele* decision [14] covers this case. The same principle which applies to portions applies equally to jointures. [Reference was made to Green's Death Duties, 4th ed., p. 478, and Sugden on Powers, 8th ed., p. 704, para. 18.] Section 14 of the Finance Act, 1894, charges the estate duty payable on the death of the sixth earl rateably on the whole settled property and the jointress must bear her apportioned share.

J. L. Arnold Q.C. for the plaintiffs.

Peter Foster Q.C. and *Michael Fox* for the jointress, Sybil Beatrix, Countess of Lonsdale. The jointress is under no duty to contribute to the estate duty. The position is different in the case of portions. There a capital sum is payable reduced by the amount of the estate duty. In applying the *Parker-Jervis* [15] principle the position is otherwise. The annuitant has to pay interest on the estate duty attributable to the slice of capital required to pay the annuity. That interest will vary with the interest earned by the estate from time to time and the interest payable in respect of the unpaid estate duty or under the mortgage raised to pay it. [Reference was made to Hanson on Death Duties, 10th ed., para. 887, and Green on Death Duties, 4th ed., p. 485.]

Smith-Bosanquet [16] is relied on. It was rightly decided. The reasons for that decision were: (1) that the appointment free of duty did not burden the estate with a greater sum than the sum authorised by the settlement, which in that case also was made before 1894; (2) the annuitant was absolved by the appointor from paying interest on the estate duty referable to the annuity under the provisions of section 14 (1). That case was followed in *In re Sebright.*[17] The decision in the *Keele* case [18] turned on the construction of the peculiar terms of the appointment under consideration. The court decided that there was no provision to the contrary within section 14 (1).

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[12] [1952] Ch. 603.
[13] [1940] Ch. 954.
[14] [1952] Ch. 603.
[15] [1898] 2 Ch. 643.
[16] [1940] Ch. 954.
[17] [1944] Ch. 287.
[18] [1952] Ch. 603.

Both wills here were made before the Act of 1894 came into force. It was intended to apply to existing settlements. There is a fundamental difference between portions and a jointure. That appears from the argument of Sir Norman Touche in the *Sebright* case.[19] [Reference was made to Farwell on Powers, 3rd ed., p. 588.] It is convenient that the power to decide whether a jointure shall be paid free of duty should be in the hands of the appointor. The decision in *Smith-Bosanquet* [20] has stood for 19 years. The court is asked to follow it. There is nothing in the *Keele* case [21] which affects its validity.

J. Pennycuick Q.C. in reply. The *Keele* case [21] shows that, where there is power to appoint a definite sum, there is no power to appoint that sum free of duty. If the direction as to payment being free of duty were in the settlement, the power would be effective under section 14. There is no distinction in principle between the *Keele* case [21] and this case. If the settlement confers power to appoint a defined sum the appointor is not entitled to throw a heavier burden on the estate.

[HARMAN L.J. referred to *In re Fitzhardinge (Lord)*.[22]]

Words which do not free portions from liability to bear a rateable part of the estate duty will not do so in the case of a jointure. There is no logical distinction in this regard between portions and a jointure. There is nothing in section 14 justifying such a distinction. There is here no provision to the contrary within section 14 (1). The phrase " free of all deductions " is not an " express provision to the contrary." The jointress must bear her share of the estate duty.

Cur. adv. vult.

October 21. The following judgments were read.

LORD EVERSHED M.R. The question before the court in this case may be stated thus: Where a life-tenant has power under a settlement to appoint a jointure of £*x* in favour of a surviving wife, can he validly so appoint free of duty, with the result that the jointress takes the appointed sum without any liability for having deducted therefrom anything in respect of the interest on so much of the estate duty exigible at the appointor's death as is properly attributable to the jointure? The principle that in the case of settled property death duty is chargeable rateably on all interests in the settled fund, whether of a capital or income nature, is enshrined in the terms of the Finance Act, 1894; but that principle is subject to a qualification to be found in the last words of section 14 (1) of that Act. The subsection reads as follows: "In the case of property which does not pass to the executor as "such, an amount equal to the proper rateable part of the estate "duty may be recovered by the person, who being authorised or "required to pay the estate duty in respect of any property has "paid such duty, from the person entitled to any sum charged "on such property, (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision "to the contrary."

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[19] [1944] Ch. 287, 291.
[20] [1940] Ch. 954.
[21] [1952] Ch. 603.
[22] (1899) 80 L.T. 376; 15 T.L.R. 225.

In my judgment, the real question in this appeal in the end of all will, as I hope to show, be found to be whether the terms of the appointment here in question were an invocation of the dispensation contained in the last words of the subsection.

The relevant facts relating to the Lowther estates are elaborate, as may be seen from the substantial volume of evidence; but for the purposes of this appeal it is not necessary to go at great length into those facts; and I turn at once to the deed of appointment whereby Lancelot Edward, the sixth Earl of Lonsdale, on the occasion of his second marriage exercised certain powers which he had under the wills of the second and third earls. The settlement on the second marriage is dated October 6, 1923. The sixth earl died in 1953, and the jointress, now represented by Mr. Foster, is the Dowager Countess of Lonsdale, who, as Sybil Beatrix Feetham, was a party to the deed of 1923.

The relevant clauses of the deed are as follows: "1. In pur"suance of the said agreement and in consideration of the said "intended marriage the said Lancelot Edward Lowther in exercise "of the power for this purpose conferred on him by the said will "of the said William Earl of Lonsdale"—that is, the second Earl of Lonsdale—"and of every other power enabling him and as "settlor hereby irrevocably appoints to the said Sybil Beatrix "Feetham in case the said marriage should be solemnized and "she should survive the said Lancelot Edward Lowther during "the residue of her life the yearly rent charge of £1,000 by way "of jointure to be charged upon all the manors hereditaments and "premises now subject to the subsisting limitations of the said "will of the said Earl of Lonsdale and to commence from the "death of the said Lancelot Edward Lowther and to be considered "as accruing from day to day but to be paid without any deduction (except for succession duty if any) by equal quarterly "payments the first payment thereof to be made" as there provided.

Clause 2 similarly invoked the power of jointuring contained in the will of the third Earl of Lonsdale. Its relevant language is the same. By that clause Lancelot Edward Lowther appointed a yearly rentcharge of £1,000 to be increased to £3,000 if (as happened) he succeeded to the earldom of Lonsdale. Again, we find the essential formula for our purposes "to be considered as "accruing from day to day but to be paid without any deduction "(except for succession duty if any)." The result, therefore, is, so far, that by the deed of 1923 the late sixth Earl of Lonsdale appointed a jointure of £1,000 free of duty by virtue of the power under the second earl's will and a jointure, in the events that happened, of £3,000 in favour of his widow free of duty under the powers contained in the will of the third earl.

It will be right for me to refer to the exact words of the relevant provisions of the wills of the second and third earls. The second earl made his will in 1871, and he died in 1872, in fact unmarried. The relevant language in the will was this. He gave power to a life-tenant of the estate by any deed or deeds or by will or codicil "to appoint to any woman whom he may marry "or have married for her life or for any less period a yearly rent "charge or rent charges by way of jointure and in bar or without "being in bar of dower and free bench not exceeding in the whole "for any one such woman the yearly sum of £1,500 to be charged "upon all or any of the said manors and hereditaments hereinbefore devised in strict settlement as aforesaid and to be paid "at such time and in such manner as to the person for the time "being exercising this present power shall seem meet."

The third earl made his will in the year 1876, the year in which he died; and he gave a similar power, in almost identical terms: "by any deed or deeds with or without power of revocation and new appointment or by will or codicil to appoint "to any woman whom he may marry or have married for her "life or for any less period a yearly rent charge or rent charges "by way of jointure and in bar or without being in bar of "dower and free bench not exceeding in the whole for any one "such woman the yearly sum of £5,000 to be charged upon all "or any of the said manors and hereditaments hereinbefore "devised in strict settlement as aforesaid and to be paid at such "times and in such manner as to the person for the time being "exercising this present power shall seem meet and to appoint "to such woman usual powers and remedies for rent charge and "rent charges by distress and entry upon and detention of the "possession and perception of the rents and profits of the "premises charged therewith and also to appoint the premises "so to be charged to any person or persons for any term of years "with or without impeachment of waste upon such trusts for "better securing the payment of the same rent charge or rent "charges respectively as to the person for the time being "exercising this present power shall seem meet."

It will be observed that the sum named in the deed of appointment of 1923 was £1,000 in the case of the power under the will of the second earl, a figure (as such) less than the figure of £1,500 stated in that earl's will. Similarly, the figure of the jointure mentioned in exercise of the power under the third earl's will was £3,000 under the 1923 deed, less by £2,000 than the figure of £5,000 mentioned in the third earl's will. The significance of that fact is only, for present purposes, this. It has been conceded by Mr. Pennycuick, representing the inheritors, that, if the provision that the jointures should be free of duty is excessive, as he contends, it is so only to the extent that the total benefit received by the jointress is excessive. If I may illustrate it by reference to the second earl's will, Mr. Pennycuick concedes that the power is valid by exercise to the extent that the sum named, £1,000, plus the freedom from liability to pay interest on duty, does not exceed £1,500.

It was suggested during the course of the argument that Mr. Pennycuick's concession was or might be to some extent inconsistent with or even destructive of certain of his arguments; and I should add that before the judge below a problem had arisen, not dissimilar in general kind from that now before the court, relating to portions. The portions appointed were, as regards the sums named, so much below the actual maxima named in the wills as to give, so to speak, plenty of lee-room as regards the one that was given free of duty; so that Mr. Pennycuick's admission there, if given its full effect, did not, on any view, make the appointment excessive. I, for myself, do not think that any concession made by Mr. Pennycuick in any way adversely affected his argument, or that those concessions need be further discussed, because they do not seem to me to contribute to the conclusion of the matter; and I therefore say no more about them. The question, put quite shortly, is, as stated by reference to the first appointment, whether, having regard to the terms of the second earl's will, which said nothing about freedom of any duty (as was, indeed, not surprising, since the will was dated 23 years before the Finance Act, 1894), it was competent for the sixth earl to make the appointment in the terms he did, so as to give the jointress £1,000 clear and to relieve her, at the expense of the inheritance, of any obligation to pay or provide any sum for interest on a proportionate amount of the estate duty, exigible on the appointor's death.

We have been informed that the estate duty in this case was at the rate of 50 per cent., so that the benefit which the jointress receives if her claim is correct and the corresponding detriment to the inheritance is, as a matter of figures, likely to be appreciable.

During the course of the argument much has turned on the effect of the decision in this court in *In re Keele Estates.*[1] Though Mr. Foster, for the jointress, has said that the present case is wholly outside anything decided in *In re Keele Estates,*[1] Mr. Pennycuick's argument was largely based on that case, and, more particularly, on the inferences which he says should be drawn from the decision. I therefore turn at once to that case, which I must recite a little fully. There was another question involved before Roxburgh J. and this court, namely, whether persons entitled to portions or jointures had to bear any share of the estate duty which was exigible, not on the death which immediately preceded the case, but on an earlier life-tenant's death. That question had been answered in the negative by Roxburgh J., whose view upon it was affirmed by this court, and that question is irrelevant for present purposes. I therefore will read only so much of the headnote as relates to the point which does bear upon this case.

It concerned an appointment by one Major Henry Sneyd, a life-tenant of the estates under the devises of Walter Sneyd who had died in the year 1888. Walter had created a certain term in trustees; and the headnote, so far as relevant, proceeds now thus: " Subject to that term "—created by Walter—" Walter " devised the settled estates to the use of Major Henry Sneyd for " life, with remainder to the appellant, Major Henry Sneyd's " sons in tail. He empowered a tenant for life of the settled

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[1] [1952] Ch. 603; [1952] 2 T.L.R. 149; [1952] 2 All E.R. 164.

" estates, either before or after he became entitled in possession, " to charge the same," and then follows a quotation from the will " ' with the payment of any sum or sums not exceeding in the " ' different events hereinbefore specified the different sums here- " ' inafter mentioned as and for the portions of his or her child or " ' children—that is to say . . . in the case of four or more " ' children ' "—which was the relevant number—" ' the sum of " ' £25,000.' "

The headnote goes on a little later: " Major Henry Sneyd by " deed poll, executed in 1931, appointed that the settled estates " should be held upon trust that after his death the trustees " should ' raise the sum of £15,000 clear of all death duties (or " ' such less sum as shall be the maximum principal sum charge- " ' able by the appointor under the power now being exercised) " ' with interest thereon at the rate of 4 per cent. in trust for each " ' of the daughters as shall be objects of the power. . . .' "

The headnote then deals with the first question (i.e., of the death duty payable on an earlier death, that is the death of Colonel Sneyd) and it continues: " A second question raised was " whether, on the death of Major Henry Sneyd, the sum " appointed by the deed of 1931 for portions ought to be charged " with a rateable part of the estate duty payable on his death, and, " if the portions were so chargeable, whether the gross aggregate " amount was £15,000 or £25,000 or some other and what sum. " Roxburgh J. held that the gross aggregate sum which could be " raised was £25,000, and the portions must bear their own duty " to the extent that the sum raised must not exceed that sum."

There was an appeal on that point by the daughters, the portioners, and, as on the other question, this court affirmed the view of Roxburgh J., holding " That on the true construction of the appointment of 1931, the first appointment of " £15,000 clear of all death duties was an excessive appointment, " and the sum raisable thereunder was the sum of £25,000 " subject to its proportion of estate duty."

This part of the case is dealt with in a second judgment. I need not read the report of the argument, because in the leading judgment, which I delivered, I referred to what Mr. Wright said on behalf of the portioners. I said this[2]: " Mr. Wright has " argued that the power in Walter's will fairly can be and should " be construed as permitting the appointor to charge an amount " exceeding £25,000 by whatever is the necessary sum, so as to

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[2] [1952] Ch. 603, 622, 623.

"produce the result that, when the sum charged has made whatever contribution towards estate duty it ought to make, there "will be a figure left of £25,000 (net) for the enjoyment of the "portioners. I agree with Roxburgh J. that such a result cannot "be fairly attributed to the sense of the language used, and I "agree with him also that some support for that view is to be "derived from the formula 'to charge the estates with payments "'of sums as and for portions.'"

Then, omitting one paragraph, I proceed to deal with the language of the document of appointment, the deed of 1931. I say: "I think that the proper approach in these cases must "always be to look first at the document and to see what it "means. The relevant words are found in clause 4 of the deed, "and are these: 'The trustees shall' at the date specified 'raise "'the sum of £15,000 clear of death duties (or such less sum "'as shall be the maximum principal sum chargeable by the "'appointor under the power now being exercised),' and so on.

"As a matter of plain terms, it seems to me that this "appointor is saying: 'I desire to charge the settled estates with "'either (i) a figure of £15,000 clear of death duties (meaning "'thereby a figure of such magnitude that there will remain "'£15,000 clear when all charges or contributions in respect of "'death duties are provided for), or (ii) if that is greater than "'the amount which the will of Walter tells me that I can "'charge, then the maximum sum that the will authorises.' As "a matter of plain English, it seems to me that that is what "it says.

"I am further unable to accept Mr. Wright's proposition that "this deed of appointment can be regarded as being a disposition "intending an express provision to the contrary within the meaning of section 14 (1)"—that is the Finance Act, 1894—"so "as to take the case altogether out of that subsection and relieve "the sums so charged for portions of any liability to contribute "and also as to enable him to say that all that was charged was "£15,000."

In the course of the argument a good deal of reliance had been placed on *In re Smith-Bosanquet*,[3] a decision of Bennett J. in the year 1940. As I shall have to deal somewhat fully with that decision hereafter, I will not now read the passage in my judgment in *Keele Estates*[4] which deals with *Smith-Bosanquet*.[5]

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[3] [1940] Ch. 954; 56 T.L.R. 960; [1940] 3 All E.R. 519.

[4] [1952] Ch. 603.

[5] [1940] Ch. 954.

Suffice it at the moment to say that I expressed the view, though it was obiter, that the *Smith-Bosanquet* [5] decision was based upon the ground that, according to the terms there used, it was or amounted to the appointment of a jointure out of a figure called the net residuary estate which would have (supposedly) paid all the duty. On that view, I expressed no dissent from the validity of the *Smith-Bosanquet* [5] decision. Indeed, it may be said that I went further and said that on that ground the decision was justified.

Further discussion, as will appear, has led me on this occasion to feel at any rate a doubt whether what I said in *Keele Estates* [6] was a sufficient or proper analysis of Bennett J.'s decision in *Smith-Bosanquet.*[7]

In my judgment, the decision in *Keele Estates* [8] is based on two conclusions: namely, (1) that on the construction of the deed of appointment in that case, that is to say, the deed of 1931, the appointor, by the words he there used, appointed or purported to appoint in favour of the portioners a gross amount equivalent to the sum which, after the deduction of the amount of estate duty properly attributable to and repayable by the portioners, left a net sum of £15,000, and, in the alternative, a less sum; and that, if and so far as the first or gross sum exceeded £25,000, it was not effective; and (2) that the appointor, by the deed of 1931 and the language which he used in it, did not purport to invoke the dispensing provision in the last two lines of section 14 (1) of the Finance Act, 1894.

Mr. Pennycuick's argument, however, goes considerably further. He says that the decision of this court in *Keele Estates* [8] necessarily involves this further proposition, namely, that all appointments of portions "free of duty" or "clear of "duty" or any similar formula must now be taken to be or to amount to appointments of gross sums so calculated that, after the appropriate amount of duty has been paid, the named net figure remains; that such appointments do not invoke the dispensing provisions of section 14 (1) of the Act of 1894; and that they are invalid, in so far as the calculated gross figure exceeds the sum stated in the deed conferring the power. Any other view, Mr. Pennycuick says, would involve, in the case of portioners, unjustifiably fine distinctions.

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[5] [1940] Ch. 954.
[6] [1952] Ch. 603.
[7] [1940] Ch. 954.
[8] [1952] Ch. 603.

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Mr. Pennycuick further contended that as a matter of logic, of good sense and of principle the same rule of construction should apply to an appointment of a jointure, that is to say that the appointment of the jointure of £*x* free or clear of duty means the appointment of a gross annual sum so calculated as to leave £*x* per annum net after deduction from the gross sum notionally appointed of the appropriate interest charge for duty, and that such an appointment is not, and must not be taken to be, an invocation of the dispensing power under section 14 (1) of the Finance Act, 1894.

Mr. Pennycuick finally added that this court only expressed approval of *In re Smith-Bosanquet*[9] on grounds which I have briefly indicated and which do not conflict with the above propositions, and that we should in any case now hold the decision of *In re Smith-Bosanquet*[9] to have been erroneous.

The decision in *In re Keele Estates*[10] has been subjected to much analysis in the argument; but I conclude that the decision only did involve the two propositions which I have stated above, namely, first, that, as a matter of construction of the relevant deed of appointment, the appointor purported to appoint in favour of the portioners a gross sum equivalent to that amount which, after deduction of estate duty, left the figure named, and, second, that the terms of that appointment did not purport to invoke the last words of section 14 (1) of the Act of 1894.

I also conclude that, even if Mr. Pennycuick is right in his argument, so far as appointments of portions are concerned (as to which I express no opinion), the inference which he draws as regards appointments of jointures does not follow and is not inherent in the decision.

This last conclusion is, I think, supported by two considerations: First, if arithmetically the appointment of a capital sum of £*x* by way of portions free of duty should or can be taken as meaning an appointment of such a sum as leaves £*x* after payment of the appropriate capital amount of duty, a similar calculation should not, and perhaps cannot, properly be made as regards a jointure. In the case of portions you are, after all, making a calculation of a capital sum once and for all; but the decision in *In re Parker-Jervis*,[11] which has always been accepted and followed, shows that this method of calculation is inapplicable, or is at least not readily or necessarily appropriate, to a jointure; for, if the proportion of the duty expressed as a capital sum attributable to the jointure is arrived at by a process of capitalisation on the basis of the then average of the income of the estate as a whole, the amount of the interest charge actually made against the jointress depends on, or may depend on, different considerations, namely, the actual interest payable in respect of the duty; and that may vary—for example, until the actual payment of the duty, it would be the rate of interest payable to the Estate Duty Office and thereafter, if the duty is raised by mortgage, it will presumably be the rate of the mortgage interest. (See the examples given in Hanson on Death Duties, 10th ed., p. 492, and Green on Death Duties, 4th ed., p. 485.)

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[9] [1940] Ch. 954.

[10] [1952] Ch. 603.

[11] [1898] 2 Ch. 643.

Other variations may occur to which I need not refer; but I should state that, in the present case, though many assumed figures were mentioned during the course of the argument, there is no evidence, as I understand it, before the court of any of the relevant figures, either those of the average rate of income of the estate as a whole at any particular period or of the rate of interest payable in respect of the estate duty on any charge which may have been incurred in respect thereof.

The second ground which I think supports my earlier conclusion that the reasoning of the decision in *In re Keele Estates* [12] in any case does not carry with it a similar proposition with regard to jointures rests upon the case of *In re Smith-Bosanquet.*[13] I have stated the grounds upon which, as it then appeared to this court, we said in *In re Keele Estates*,[14] the decision could be justified; but I am far from clear, on further reflection, whether the ground there stated was the correct or at any rate the only ground upon which Bennett J. based himself. It was a case, like the present, of an appointment of a jointure free of duty, and, as I read the case after the assistance we have had in the present argument, I think now that it is impossible to escape the conclusion that part at any rate of Bennett J.'s decision (to put it no higher) was based on the view that the appointor had invoked, and effectively invoked, the dispensing power under section 14 (1). Again, in view of the importance paid in the argument to the *Smith-Bosanquet* case,[15] I think I must refer to it at a little length now. I am bound to say at once that the matter is not made easier (though I am not saying this by way of criticism of the law reporter) by the report and particularly the report of the argument. I start by reading the headnote: "Under a settlement of real and personal estate made "by will in 1905, there was a power given to the tenant for life "to appoint for the benefit of his widow any part of the income "of the residuary trust estate not exceeding £2,000 a year for "the rest of her life.

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[12] [1952] Ch. 603.

[13] [1940] Ch. 954.

[14] [1952] Ch. 603.

[15] [1940] Ch. 954.

"The tenant for life by his will made in 1934, appointed in "exercise of this power to his wife who survived him, an annuity "of £2,000 free of all deductions except income tax and sur-tax, "to be charged on and payable out of the income of the residuary "personal estate of the settlor"—not the appointor but the settlor. "On the death of the tenant for life in 1939 estate duty "upon the residuary estate became payable at the rate of 32 per "cent." I pause to observe that the appointor was making an appointment under a power in regard to estates settled in 1905, thirty years earlier, and was therefore ex faciae a case to which section 14 obviously applied.

The author of the headnote concludes that note as follows: "*Held*, that the appointment was within the terms of the power, "and that the widow was entitled to an annuity of £2,000 clear, "without any liability under section 14 (1) of the Finance Act, "1894, to contribute to the estate duty payable on the death of "her husband, the direction that it should be paid 'free of all "'deductions' being an express provision to the contrary within "that subsection." It is, of course, quite plain that, if that headnote correctly summarises the judgment, then Bennett J. based himself, and according to the headnote based himself exclusively, on the view that the dispensing power under section 14 had been intentionally and successfully invoked.

I need not read the facts, because they are sufficiently stated in the headnote. The argument by learned counsel for the widow is stated to be as follows: "The power to pay the annuity out "of the income of the residuary estate, means out of such income "after the estate duty has been paid. The annuity is not a "jointure but an apportioned part of a much larger total income. "The income of the residuary estate can only be ascertained "after the estate duty payable on the death has been paid. The "annual sum of £2,000 means the net sum of £2,000 after "deduction of income tax and sur-tax thereon, but free of all "other deductions. The appointment was within the terms of "the power." Then, in parenthesis, there are these six words: "Counsel were stopped by the court."

It is to be observed that that argument, on the face of it, goes entirely on the view that the appointment was the appointment of the net sum payable out of a total net residuary income and there is no reference to section 14 from first to last in it. I have already stated that the difficulty in apprehending that line of reasoning is that this was an appointment of settled properties settled under a will thirty years earlier than the making of the appointment.

There then follows the record of the argument of counsel for the infant tenant in tail: "The appointment is an excessive "execution of the power. The widow will get under it not "£2,000 only, clear of all deduction, but £2,000 plus her share "of the estate duty which she would otherwise have had to pay. "It is equivalent to an annuity of £2,620." I am bound to say that that last figure has defeated me. I can see that as a matter of arithmetic £640 would be 32 per cent. of £2,000, so that if the figure had been £2,640 it would have been more easily intelligible; but on any view that is the wrong way round to calculate it, I should have thought. But that is merely by the way. "The words 'without any deduction' amount to an additional "grant, not justified by the power. Unless the power authorises "the appointment of an annuity free of all deductions, which it "does not in the present case, the appointment is not within the "terms of the power."

Then, after certain cases are cited, the report proceeds: "The "case comes within the rule laid down in *In re Parker-Jervis.*[16] "The widow should be treated as tenant for life of the capitalised "value of her annuity, and pay during her life interest on the "estate duty to which that value is liable." I need not read the last paragraph. Observe again that there is no reference whatever, in terms at any rate, to section 14.

Bennett J. begins his judgment by a recital of the facts and he sets out in full [17] section 14 (1) of the Finance Act, 1894, which, so far as I am aware, is the first time in the report that that Act is referred to or mentioned at all. The judge goes on as follows: "The case of the infant defendant is put in this way." That is the tenant in tail. "The appointment made in favour of the "widow is an appointment of the yearly sum of £2,000 free of "all deductions except income tax and sur-tax. The words "'free of all deductions' are words which amount to an express "provision to the contrary, within the meaning of section 14 (1)

[16] [1898] 2 Ch. 643.

[17] [1940] Ch. 954, 958.

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" of the Finance Act, 1894, and so exonerate the appointee from " the liability for the rateable proportion of the estate duty for " which she would be liable under the provisions of subsection (1) " of section 14 if the words had not been in the appointment."

I observe that the judge is there saying that the infant defendant's argument appears to concede that it is an invocation of section 14 but that, because it thereby increases the total amount of the benefits, it is excessive. If that was the argument for the infant defendant, it is not so reported.

However, Bennett J. proceeds [18]: "The argument is that, " because the appointee is exonerated from estate duty, there- " fore the appointor, the donee of the power, has made an " appointment which is in excess of the authority conferred on " him by the terms of the power. The argument is that, unless " in the power there are words expressly enabling the donee of " it to make an appointment free of all deduction, appointment " so made is not warranted by the terms of the power.

" I do not accept the argument. It seems to me that, so long " as the appointment made in exercise of the power does not " charge the income of the residuary trust fund with a greater " annual sum than £2,000, the appointment is within the terms " of the power. The appointment which the donee of the power " has made does not have the effect of charging the annual " income of the residuary trust fund with a greater sum annually " than £2,000. The widow out of the income of the residuary " trust fund gets no more than £2,000. It is true she is absolved " from liability which otherwise might be imposed on her of " having to pay a proper rateable part of the estate duty " leviable, when her husband died, on the residuary trust fund " under the testator's will "—it is not the husband's will—" but " an appointment which has that effect does not, in my judgment, " exceed the authority which is conferred on the donee of the " power by the terms of the testator's will.

" I think, therefore, the answer to the question raised is that " the widow is entitled to a clear annuity of £2,000, and entitled " to such annuity without being liable to contribute towards estate " duty payable on the death of G. R. Bosanquet Smith- " Bosanquet," that is the appointor or the lady's husband.

I quite agree that there is language in the last paragraph which seems to some extent to reflect the reported argument put forward on behalf of the widow. But, reading the last paragraph with that which preceded, which, in turn, follows the citation of section 14 (1), I cannot now, I must say, resist the conclusion that the judge accepted (what may indeed have been conceded) that the words in the appointment did in terms constitute, if they were effective to do so, an invocation of the dispensing power of section 14 (1); and that, of course, is clearly reflected in the last two or three lines of the headnote.

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[18] [1940] Ch. 954, 959.

I ought now to go back to see what was said about that case in *Keele Estates.*[19] My judgment first consists of a recital, including a reference to the argument of counsel for the widow. I then pass on to consider a later case, *In re Sebright's Will Trusts,*[20] which came before Vaisey J., who, in fact, had been counsel for the widow in *Smith-Bosanquet.*[21] I do not propose to take up time by referring to *Sebright.*[22] Vaisey J. had felt some difficulty about it, but in the course of *Sebright's* case,[22] Sir Norman Touche is reported as having put the matter thus as regards the earlier decision in *In re Smith-Bosanquet*[23]: "The annuity was payable out of the income of a residuary trust "fund, the amount of which was only arrived at after payment "of estate duty." That, as I observed in my judgment, reflected Vaisey J.'s argument in *Smith-Bosanquet.*[23] The citation from Sir Norman Touche's argument proceeds: "That does not apply here. The judgment in that case does not make it clear on what "ground it was decided, but if it is indistinguishable from the "present case, it was not correctly decided."

I proceed in my judgment to say[24]: "We are in this case "concerned with a charge on the corpus and with the language of "these two instruments"; that is, of course, the enabling will and the deed of appointment. "I do not think that the decisions "in *In re Sebright*[25] or in *In re Smith-Bosanquet*[26] are of such a "character as to be indistinguishable in any event from the "present case; and I, therefore, feel at liberty to decide the present "case, as did Roxburgh J., without regard to the decisions in "those cases. But, if I comprehend the cases aright, I think Sir "Norman Touche, in his argument in *In re Sebright,*[27] correctly "justified the decision in *In re Smith-Bosanquet*[28] on the ground "that the sum appointed was payable out of the income of a

[19] [1952] Ch. 603, 624.

[20] [1944] Ch. 287; 60 T.L.R. 334; [1944] 2 All E.R. 547.

[21] [1940] Ch. 954.

[22] [1944] Ch. 287, 291.

[23] [1940] Ch. 954.

[24] [1952] Ch. 603, 625.

[25] [1944] Ch. 287.

[26] [1940] Ch. 954.

[27] [1944] Ch. 287.

[28] [1940] Ch. 954.

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"residuary trust fund which would be arrived at after all relevant "deductions for death duties." I conclude: "But I need not "say more about those two cases for I think that they do not "cover a case such as the present, where in plain terms (as I "think) authority was given to charge the settled estates with a "capital sum of a limited amount, and where the necessary effect "of the language of the appointment or the first alternative in "the deed of appointment would inevitably be to charge the "settled estates with a larger figure than that figure."

I ought to add that my brother Romer expressed agreement with my judgment and said [29]: "In particular I should like to "associate myself with the observations which he has made with "regard to the cases of *In re Smith-Bosanquet* [30] and *In re* "*Sebright.*" [31]

I apprehend that what was said about *Smith-Bosanquet* [32] is obiter, because I had already stated, and my brother agreed with me, that in any case *Keele Estates* [33] turned on the construction of the language used, and was not in pari materia with *Smith-Bosanquet.*[34] But, on further reflection, and after attending to the argument in this case, I am unable now to say that at any rate one ground, part of the basis of Bennett J.'s decision, was not this, that he thought that the appointment free of duty of the jointure was an invocation of section 14 (1) of the Finance Act, 1894, and as such was effective.

The result, therefore, is that I conclude that *Keele Estates* [35] does not carry Mr. Pennycuick home, because the inferences, and particularly the last of them, which he sought to draw from that decision do not follow. It therefore comes to this: that the question in the present case is open before this court and is, I think, two-fold, namely, first, are the words of appointment in the deed of 1923 apt as an invocation of the dispensing provision of section 14 (1) of the Finance Act; and, secondly, if so, was such a dispensation within the powers of the appointor, having regard to the terms of the wills of the second and third Earls of Lonsdale?

As regards the first point, I think the answer must plainly be in the affirmative, and I refer in support of that view to the decision in this court of *In re Fitzhardinge.*[36] In that case the question arose not with regard to an exercise of the power of appointment

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[29] [1952] Ch. 603, 626.

[30] [1940] Ch. 954.

[31] [1944] Ch. 287.

[32] [1940] Ch. 954.

[33] [1952] Ch. 603.

[34] [1940] Ch. 954.

[35] [1952] Ch. 603.

[36] (1899) 80 L.T. 376; 15 T.L.R. 225.

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but as regards the document conferring the power. That document, so far as relevant, is sufficiently cited in the headnote: "A testator, who died in October, 1857, by his will dated in "September, 1856, empowered any tenant for life to charge on "the estates thereby settled a jointure not exceeding £3,000 a "year, for his widow 'free from all taxes and deductions except "'property tax and legacy or succession duty.'"

It will suffice if I read a passage from the judgment of Sir Nathaniel Lindley M.R., where he says[37]: "That disposes of the "case, subject to one remark that has to be made on section 14 "of the Finance Act, 1894. Mr. Warrington has argued that "the expression 'free from all taxes and deductions except "'property tax or legacy or succession duty' is not an express "provision contrary to the enactment of section 14. In terms as "a matter of criticism it perhaps is not, but if you look at the "substance of it, it is as plain as a provision to the contrary as "can be. It is only by minute criticism of the words that Mr. "Warrington can say that this does not expressly provide for "deductions to made under section 14." It seems to me to follow that if in an appointment of a jointure you use the added formula "free of duty," then equally you must be taken to be referring to the last words of section 14 (1) of the Act of 1894.

There remains the second question, however: Was such a dispensation within the powers of the appointor, having regard to the terms of the wills of the second and third earls? I have thought this a more difficult question, since I feel that the result may, under modern conditions, work somewhat hardly or unfairly against the inheritor, and I also confess to some doubt what, in terms of conveyancing, a deed giving power to appoint a jointure should say if it is or is not intended to confer a dispensing power under the section. But, on the whole, I think that this question also should be answered in the affirmative. If there be unfairness, I think that must be properly attributable to the chances of the passage of time, and settlors today will no doubt fix the amount of any jointure, which they give a tenant for life power to appoint, in the light of the present-day rates of taxation, or use such words as may be appropriate to limit the dispensing power of the appointor.

I think, therefore, as a matter of English, that what the appointor has said here is within the terms of section 14 (1) on the ordinary meaning of its language. I think, in other words, that the instrument of appointment should constitute, and does

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[37] 80 L.T. 376, 380.

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constitute, a " disposition " within the language of the subsection. I read again the relevant terms of the section: " In the case of " property which does not pass to the executor as such, an " amount equal to the proper rateable part of the estate duty " may be recovered by the person, who . . . has paid such duty, " from the person entitled to any sum charged on such " property (whether as capital or as an annuity or otherwise,) " under a disposition not containing any express provision to the " contrary."

As a matter of strict law it is no doubt true to say that the widow in this case has the charge for her jointure by the joint effect of the wills of the second and third earls and the exercise by the sixth earl of the powers of appointment conferred on him by the second and third earls; but that does seem to me to exclude the proposition that the jointure is, as a matter of the fair use of words, charged " under a disposition " (namely under the appointment) which does contain a provision to the contrary. For, if for some purpose the deed of appointment must be read with, or as one with, the wills conferring the power, still it was the appointment which specified and created the charge.

Parliament in 1894 must surely have known, when enacting this section, that there would be many outstanding settlements which could not sensibly have conferred such a dispensing power upon the person having the right to appoint a jointure. Finally, I think we ought not in this court in 1959 to overrule the case of *In re Smith-Bosanquet*,[38] which has, after all, stood for 19 years. During that period it is likely to have been followed in practice, and although it may be said that the grounds attributed to Bennett J. were not there correctly or not completely stated in this court, the decision was approved, albeit obiter, in *Keele Estates*.[39] I therefore think that if the case of *In re Smith-Bosanquet*[40] is now to be said to be wrong, that should be a matter to be dealt with on an appropriate occasion by the House of Lords, which will also, no doubt, consider this case and the case of *Keele Estates*[41] and do any necessary reconciliation.

For reasons which I have tried to state, I think that Vaisey J. correctly decided the present point, and I would therefore dismiss the appeal.

Sellers L.J. The estate duty which the Finance Act, 1894, first imposed obviously had to fall for final payment or allocation on some part of the estate on which it was levied. Whatever might be thought to be fair now, when taxation is heavy (and the argument that the burden of the tax should be borne rateably without qualification is not all one way), section 14 (1) of the Act of 1894, while making provision for the proper rateable part of the estate to be recovered in the appropriate circumstances, decreed that it could be recovered " from the person entitled to " any sum charged on such property, (whether as capital or as " any annuity or otherwise,) under a disposition not containing " any express provision to the contrary."

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[38] [1940] Ch. 954.
[39] [1952] Ch. 603.
[40] [1940] Ch. 954.
[41] [1952] Ch. 603.

This seems to give a right to the person making the disposition to provide that the capital or annuity of which he is making a disposition should not bear the burden of the tax. His right with regard to the incidence of the tax is therefore given and recognised by statute and is independent of any prior deed or authority which gave the power to charge any property, at least where the deed placed no express restrictions to the contrary.

I agree with the judge that the appointments in this case were so worded as to free the payments from any deduction for estate duty, or, more accurately, so as to free a person entitled to any sum charged from any liability to contribute a rateable part of the estate duty. The disposition would appear to be the final disposition making the charge.

In this case the dispositions were not in excess of the powers granted and in my opinion they should stand unaffected by the estate duty or any part thereof.

I agree with the conclusion of Bennett J. in *In re Smith-Bosanquet*,[42] summarised, I think accurately, in the headnote to that case.

Reliance was placed by the appellant on *In re Keele Estates*,[43] which in terms distinguished *Smith-Bosanquet* [44] and therefore, as my Lord has indicated more fully, does not bind this court on the issues which are now before it.

I would dismiss the appeal.

HARMAN L.J. I agree. In my judgment the confusion, if there be confusion, into which the reporter in *Smith-Bosanquet* [44] fell arises from this, that section 14 of the Finance Act, 1894, was quite a novel and revolutionary piece of legislation. The estate duty on property not passing to the executor as such was

[42] [1940] Ch. 954.

[43] [1952] Ch. 603.

[44] [1940] Ch. 954.

charged on the corpus of the estate. The revolution effected by section 14 was to relieve the inheritance pro tanto of that burden by distributing it among the portioners and annuitants coming ahead of the inheritors. The effect of the section is to give a dispensing power to the disposer who created the charge. The disposer in this case, as in others of the sort, seems to me necessarily to be the person who exercises the power, be it a jointure or a portion, because it is he, after all, who makes the power effective. If he does not exercise the power, no charge is thrown upon the inheritance. He may exercise the power up to the limit of the figure he is given. When he adds the words " free of duty " or similar words he is not exercising the power at all. It is, in my judgment, a fallacy to treat it as if he were exercising further the power. It is true that he burdens the inheritance and frees the jointress; but that is a right given to him by the statute. You do not have to refer to the power at all. Therefore Vaisey J.'s observations are, in my view, right, that, provided the jointress gets no more than the donor of the power intended she should have, there is no question of an excessive exercise. Whether I should have construed the appointment in *Keele Estates* [45] as the Court of Appeal did is not to the point; so construed the appointment there was clearly in excess of the power. Therefore I regard it as a decision on the construction of the very peculiar words there used and not really ad rem in the present case.

I agree with my brethren in thinking that the contrary intention, which must be expressed in the document, must be contained not in the donor's words but in the donee's words, because he is the person who is creating the charge which is the necessary precondition of the dispensing power. The exercise of the dispensing power does not entitle the donee to a charge at all; it merely relieves him of this extra liability created by section 14 (1). It is a mistake, I think, to treat the exercise of the statutory dispensing power as a further exercise of the power of appointment.

I would dismiss this appeal.

Appeal dismissed with costs.

Solicitors: *Francis Miller & Steele for Dickinson, Miller & Turnbull, Newcastle-upon-Tyne; Crawley, Arnold, Ellis & Ellis; Ellis, Peirs & Co.*

B. A. B.

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[45] [1952] Ch. 603.

PHILIPSON-STOW AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[1958 P. No. 1727.]

C. A.

1959
Oct. 22,
23, 26, 27;
Nov. 20.

Lord Evershed M.R., Sellers and Harman L.JJ.

Revenue—Estate duty—Property chargeable—Immovable property situate outside Great Britain—Settlement—Testamentary disposition—Whether property excluded for estate duty purposes from property passing on death of tenant for life—Proper law of disposition—Finance Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

Conflict of Laws—Immovable property—Will—Settlement—Trust for sale—Proper law.

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate "duty not to include any property passing on the death which is "situate out of Great Britain if . . . the proper law regulating "the devolution of the property so situate, or the disposition under "or by reason of which it passes, is the law neither of England nor "of Scotland and . . . (*c*) that the property . . . is, by the law of "the country in which it is situate, immovable property."

By his will made in English form, a testator, having declared that, inasmuch as he had an English domicile, his will should operate as far as the case admitted according to English law, devised certain property in England, defined in the will as his "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." The testator died on May 17, 1908, domiciled in England. His wife died on December 22, 1930; and his eldest son on September 23, 1954.

The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. On the question whether the land in South Africa, which was by the law of South Africa immovable property, was, by virtue of section 28 (2) of the Finance Act, 1949, excluded, for estate duty purposes, from the property passing on the death of the testator's son, Upjohn J. held that it was not excluded. On appeal:—

Held (dismissing the appeal, Harman L.J. dissenting), that as before the testator's son died the estate had been fully administered and the income of the South African land had been received and applied by the trustees as part of the general income of the estate in pursuance of the directions in the will, on the son's death the property passed by reason only of those dispositions to the present tenant for life; accordingly, for the purposes of section 28 (2), the proper law regulating the disposition was the law which the testator had intended by the terms of his will should regulate his dispositions, that is English law, and the South African property was not excluded for estate duty purposes from the property passing on the death.

In re Moses [1908] 2 Ch. 235; *In re Miller* [1914] 1 Ch. 511; *In re Berchtold* [1923] 1 Ch. 192 distinguished.

Attorney-General v. *Johnson* [1907] 2 K.B. 885 applied.

Per Harman L.J. So long as the property remained an immovable it was controlled by the lex situs; the existence of the trust for sale in the will had not altered the quality of the property from an immovable to a movable asset for the lex situs did not so admit.

Decision of Upjohn J. [1959] Ch. 395; [1959] 2 W.L.R. 427; [1959] 1 All E.R. 583 affirmed.

APPEAL from Upjohn J.

By his will, dated March 14, 1898, the testator, Sir Frederic Samuel Philipson Philipson-Stow, declared, by clause 2, that "inasmuch as I have an English domicile it is my wish and "intention that this my will and any codicil I may make shall be "construed and operate as far as the case admits according to "the law of England." Having appointed executors and trustees, the testator, by clause 4 of the will, devised his Blackdown Estate near Fernhurst in the county of Sussex, defined as "my settled "estates," to the use of his wife for her life with remainder to his trustees for a term of 100 years upon trusts which had long since come to an end, with remainder to the use of his eldest son, Sir Elliot Philipson Philipson-Stow, for his life, with remainder to the use of the first and every other son of his eldest son in tail male with remainders over. By clause 5, he directed that, if any person to whom an estate in tail male was limited was born in his lifetime, the estate tail was to be cut down to a life interest. By clause 16 he declared that his trustees should be trustees of the will and every compound settlement consisting of the will and any other instrument for the purpose of the Settled Land Acts.

By clause 25, the testator devised and bequeathed all his "real and personal estate whatsoever wheresoever and whether "situate or being in the United Kingdom or in South "Africa or elsewhere (except such real and personal estate and "effects hereinbefore or by any codicil to this my will otherwise "disposed of)" to his trustees upon trust for sale and conversion, with an extensive power of postponement and the usual directions for payment of funeral and testamentary expenses and investment of the proceeds. Subsequent clauses of the will contained directions to the trustees to set aside out of the residuary estate portions for daughters and younger sons; and by clause 37, the testator provided that " The ultimate residue of the said investments representing my said residuary estate after setting apart "and appropriating the several funds aforesaid for the benefit "of my daughters and younger sons shall be held by my trustees "upon the trusts following (that is to say) Upon trust after "providing thereout if need be for such keeping up and repair of "my said mansion house and settled estates as aforesaid to pay "the annual income thereof to my said wife during her life she "maintaining and educating and keeping a home for my sons "and daughters And after her death such ultimate residue shall "be held by my trustees as if the moneys or investments representing the same were capital moneys arising under the Settled "Land Acts 1882 to 1890 from my said settled estates."

Clause 39 contained wide powers for the investment of capital money in the usual trustee securities, extending to investment not only in the United Kingdom, but the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic. Clause 41 directed that all net rents, profits and income arising from the residuary estate until the sale, calling in and conversion should be treated as income arising from the proceeds of a sale. Clause 42 gave the trustees wide powers of management, including the management of immovable property abroad, and by clauses 43 and 44 power was given to appoint agents for that purpose and to delegate powers. By a codicil dated May 6, 1908, the testator substituted his son in the place of one of the executors named in the will who was a South African resident in South Africa.

The testator died on May 17, 1908, resident and domiciled in England. At the date of his death he owned a five-tenths undivided interest in farm property, known as " Steenbokspan," in the Union of South Africa. In 1916 the various persons entitled to undivided shares in the property entered into an arrangement by way of partition in accordance with and effective by South African law, whereby the trustees of Sir Frederic's will became entitled to a seven-eighths undivided share in the property in lieu of their previous interest. It was not submitted that the interest of the trustees derived from the partition but the case was argued on the footing that the trustees' present interest was that of which the testator had purported to dispose by his will. The executors and trustees paid the legacies and made provision for the daughters' and younger sons' portions.

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They retained, in exercise of their power to postpone sale, and at the date of the hearing still retained, the land at Steenbokspan. The income arising from that land had been paid to the testator's widow during her life and, after her death on December 22, 1930, to the testator's eldest son. He died on September 23, 1954, and his son, Sir Frederic Lawrence Philipson-Stow, became entitled to the income for life, his interest, as Lord Evershed M.R. pointed out, having been affected by the provision in clause 5 of the will.

On August 25, 1958, the trustees took out a summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine, inter alia, whether the share in the land at Steenbokspan now forming part of the testator's residuary estate ought to be treated for the purposes of estate duty as excluded, by virtue of section 28 (2) of the Finance Act, 1949,[1] or otherwise, from the property passing on the death of his son, or ought to be treated as passing on such death.

Upjohn J. held that on the construction of section 28 (2) the farm passed under a "disposition," that is, the testator's will, and not by devolution, and that the proper law regulating a testamentary disposition of foreign land was dependent on the testator's intention, which in this case pointed to the English law. Accordingly, he held that the farm was not excluded from the property passing on the death of his son for purposes of estate duty.

The trustees appealed. It was conceded that their interest in Steenbokspan was immovable property by the law of South Africa for the purpose of section 28 (2) (*c*) of the Act of 1949.

J. Anthony Plowman Q.C. and *R. Cozens-Hardy Horne* for the plaintiffs, the trustees of the will. In section 48 (2) of the Finance Act, 1949, "devolution" and "disposition" are mutually exclusive. "Devolution" is a passing by operation of law, while "disposition" is a passing under an instrument such as the will in the present case. The partitioning of the property in 1916 was no more a "disposition" under which the property passed than an instrument of transfer on a change of investment by trustees would be. The Crown has conceded that by the law of South Africa the farm is "immovable property."

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[1] Finance Act, 1949, s. 28 (2): "As respects property passing on the "death of a person dying after the "commencement of this Part of this "Act, subsection (2) of section two "of the Finance Act, 1894 (which "exempts from estate duty property "situate abroad and not chargeable "with legacy duty or succession "duty), and section twenty-four of "the Finance Act, 1936 (which "restricts the exemption conferred by "the said subsection (2)), shall not "have effect; but that property shall "be deemed for the purposes of estate "duty not to include any property "passing on the death which is "situate out of Great Britain if it is "shown that the proper law regulating the devolution of the property "so situate, or the disposition under "or by reason of which it passes, is "the law neither of England nor of "Scotland and that one at least of "the following conditions is satisfied, "namely,— . . . (*c*) that the property so situate is, by the law of "the country in which it is situate, "immovable property."

The "proper law" does not depend on the intention of the testator. It is the law by virtue of which the beneficiary becomes entitled: see the observation of Lord Cranworth L.C. in *Wallace* v. *Attorney-General*[2] as to the limitation to be placed on the liability to succession duty. The proper law regulating a devise of foreign immovables is, therefore, the lex situs: see *In re Moses*[3] and *In re Miller*.[4] The general rule, as stated by Dicey in Conflict of Laws, 7th ed., pp. 512, 514, 520 and 528, is that rights over immovables are governed by the lex situs, but he adds at p. 528 that that law will not necessarily be applied in construing a document, for there the intention is material: see *In re Miller*.[4] The beneficiary's title depends on the recognition by the law of South Africa of the validity of the will, and that law has to be applied although the testator has stated that the English law is to apply.

The general rule as stated by Dicey is not ousted by the existence of the trust for sale. The trust for sale, whether expressed or implied, does not alter the nature of the property to a movable asset: *In re Berchtold*.[5] That was a case of intestacy, but that is an immaterial distinction. [Reference was made to *Murray* v. *Champernowne*.[6]]

Marlborough (*Duke*) v. *Attorney-General* (*No. 1*)[7] is distinguishable. That case related, not to a will, but to a contract, and did not concern immovables. A contract relating to immovables may fall within the exception to the general rule stated by Dicey at p. 524, where, on the authority of *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*,[8] he said that a contract relating to foreign immovables operates in personam and will not be governed by the lex situs if a contrary intention is apparent.

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[2] (1865) L.R. 1 Ch. 1.

[3] [1908] 2 Ch. 235.

[4] [1914] 1 Ch. 511.

[5] [1923] 1 Ch. 192.

[6] [1901] 2 I.R. 232.

[7] [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165.

[8] [1910] 2 Ch. 502.

A settlement is a contract, and *Marlborough (Duke)* v. *Attorney-General (No. 1)* [9] turned on the meaning of the "proper law "of the contract": see also *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[10] It was because the phrase "disposition under "which property passes" covers the contractual type of case, in which there may be liability to English estate duty, that the section could not provide simply that foreign immovables should not be subject to estate duty.

If the interests created by the disposition were not recognised by the lex situs, the beneficiaries could not get the trusts enforced by the English courts, for there would be no enforceable rights under the trust. In so far as the property passes under the disposition, the proper law regulating the disposition will be that which anyone interested has to invoke if he is not getting what he is entitled to have.

At the beginning of the twentieth century liability to estate duty was dependent on liability to succession duty. When succession duty was abolished the question of liability of foreign property to estate duty had to be redefined, but there was no reason for substantially altering the test, and it is submitted that the test is still that which was applied in *Wallace* v. *Attorney-General.*[11]

At first sight *Attorney-General* v. *Johnson* [12] appears to be against the plaintiffs' submission, but it is submitted that the first question there, whether the property which passed was foreign immovables or movables, was wrongly decided, and, if that was so, then the case is not an authority on the further question which is the issue in the present case. Further, it is inconsistent with *In re Berchtold.*[13] *Attorney-General* v. *Johnson* [14] was commented on in *In re White* [15] by Lord Greene M.R., but it is submitted that he did not make it easier to understand by saying that there was a notional conversion, for that would not prevent the property still being an immovable. Even if *Attorney-General* v. *Johnson* [16] was not wrongly decided, the decision cannot be supported on the reasons given by Bray J. Both passages from *Attorney-General* v. *Belilios* [17] referred to by Upjohn J. are obiter

[9] [1945] Ch. 78.
[10] [1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206.
[11] L.R. 1 Ch. 1.
[12] [1907] 2 K.B. 885.
[13] [1923] 1 Ch. 192.
[14] [1907] 2 K.B. 885.
[15] [1939] Ch. 131, 141; [1938] 2 All E.R. 691.
[16] [1907] 2 K.B. 885.
[17] [1928] 1 K.B. 798; 44 T.L.R. 214.

because of the situation of the property and the fact that the testator was domiciled in Hongkong, and it is submitted that both passages were wrong. The only possible case which could have supported them is *Attorney-General* v. *Johnson.*[18] If that case is treated as authority for the proposition that although the property which passed was immovable property abroad, the beneficiaries claimed their title to it under English law because it was subject to an English trust, then the converse would be true and one could avoid estate duty by creating a trust for the investment of English property in foreign land.

It is not submitted that the whole will is the "disposition," but only the relevant clauses. The Crown has conceded that a different proper law may apply to different dispositions in a single will. There may be more than one proper law affecting even one clause, as in *In re Miller.*[19]

[HARMAN L.J. Is this a matter of forum?]

The difficulty in treating it in that way is what was said in *Marlborough* (*Duke*) v. *Attorney-General*[20] on the distinction between the lex fori and the lex situs. They are two different conceptions. If an English testator makes a will in English form devising land in South Africa "to my issue" and says that as far as possible he wants English law to apply, if South African law happened to give no prima facie meaning of "issue," then, so far as construction was concerned, the English courts might say that it should be determined according to the English interpretation, for, as Dicey said, the question of construction is an exception to the general principle: see exception 6, p. 528.

[HARMAN L.J. If one could take under both English and South African law, could one say that the proper law of the disposition was the two laws?]

So far as I know, no disposition can have two proper laws. In *In re Miller*[21] there were two properties and two proper laws and two dispositions, but here the proper law is exclusively South African.

If, however, it is held that the test is whether the property was held on an effective trust for sale on the death of Sir Elliot, then it is submitted that this was not an effective trust for sale. The property had in fact never been sold. It had been retained for over 50 years. If there had been any notional conversion, equally there had been a reconversion to "land" by section 78 (1) of the Settled Land Act, 1925: sections 75 (1) and 119.

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[18] [1907] 2 K.B. 885.

[19] [1914] 1 Ch. 511.

[20] [1945] Ch. 78.

[21] [1914] 1 Ch. 511.

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Cozens-Hardy Horne following. In his judgment in the court below the judge said that "it is not disputed that the proper law "means the law which the testator intended," but the proper law does not depend solely on intention. The proper law is that which in fact governs the devolution or the disposition under and by reason of which the property passes. The intention of the testator was not the governing factor in either *In re Moses* [22] or in *In re Miller*.[23] Dymond on Death Duties, 12th ed., at p. 686, citing *Wallace* v. *Attorney-General*,[24] says that the lex situs governs immovables unless one has a pre-existing trust for sale; but presumably the exception is based on *Attorney-General* v. *Johnson* [25] and does not apply in the present case.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown. "Proper law," whether in a contract, a voluntary disposition inter vivos or a settlement created by will, depends, as Lord Wright said in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*,[26] on intention. The intention has to be derived from the terms and the form of the disposition, read in the light of the surrounding circumstances, particularly the trustees appointed, the nature of the property and the whereabouts and domicile of the beneficiaries. In the present case all these indicate that the proper law should be English law. Reliance is placed on *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*,[27] in which the decision of the Court of Appeal that the proper law was English was not challenged, although the case as a whole was reversed by the House of Lords. If the "proper law regulating the disposition" is always the lex situs, section 28 (2) would have been expressed differently. Plainly the charge for duty was not to be excluded merely because the property was a foreign immovable; it was also necessary to show that the "proper law regulating" the particular disposition under which the property passed was not English. Before the abolition of succession duty if a testator gave foreign immovables to trustees on trust for sale to bring the proceeds to this country and to hold them on English trusts, then succession duty was payable on the immovables and, therefore, estate duty. If the plaintiffs' view is accepted, the Act of 1949 would have effected an important change in the law. It would be more reasonable to construe section 28 (2) in a sense which is consistent with the interpretation put on the earlier legislation and to give to the expression " proper law " the sense which Lord Greene M.R. gave to it in *Marlborough (Duke)* v. *Attorney-General (No. 1)*.[28]

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[22] [1908] 2 Ch. 235.
[23] [1914] 1 Ch. 511.
[24] L.R. 1 Ch. 1.
[25] [1907] 2 K.B. 885.
[26] [1938] A.C. 224.
[27] [1910] 2 Ch. 502.

The " proper law " of any disposition is determined once and for all at the date when it becomes operative, and in the case of a testamentary disposition that is the date of the death: see *Attorney-General* v. *Belilios*.[29] The proper law of the administration and of the execution of the trusts may, however, be different: see *Attorney-General* v. *Campbell*.[30] If a testator dies possessed of foreign immovables and by will directs them to be sold and the proceeds held on English trusts, for example, as part of the general mass of his English estate, on his death the immovables vest under the lex situs in whoever is the appropriate person according to that lex; it is often the heir. The duty of that person is to administer the estate in the country of the situs in accordance with the laws of that country until he has cleared the assets in question. Then his duty is to treat the assets or their proceeds as subject to the English trusts, the proper law of which is, ex hypothesi, that of England. In due course the property, or the proceeds, comes into the enjoyment of the person beneficially entitled under the testamentary settlement, that is, the disposition. It makes no difference to the " proper law " of the settlement that the beneficiary might have to sue in foreign courts to make the heir do his duty. If the disposition is invalid under the lex situs, the lex situs will prevail and prevent it from operating. The disposition does not fail because the lex situs is the " proper law " but because that lex does not allow it to take effect in accordance with the law selected by the testator. That is a typical case of conflict of laws and it was that situation that Dicey was dealing with in rule 85. The true meaning of that rule is stated in *Bank of Africa Ltd.* v. *Cohen*.[31] There is, however, no such conflict in the present case, and the law of South Africa has long since ceased to have anything to do with the matter.

Section 28 (2) is a re-enactment of the law as stated in *Attorney-General* v. *Johnson*,[32] which was rightly decided, though some of the reasoning cannot be supported. That case was unanimously approved by the Court of Appeal in *Attorney-General*

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[28] [1945] Ch. 78.
[29] [1928] 1 K.B. 798.
[30] (1872) L.R. 5 H.L. 524.
[31] [1909] 2 Ch. 129, 143; 25 T.L.R. 625.
[32] [1907] 2 K.B. 885.

v. *Belilios.*[33] The vital test is the testator's intention, and there is no relevant difference between immovables and movables or between contractual and voluntary dispositions. *Wallace* v. *Attorney-General*[34] laid down the general principle that there was only liability to succession duty in respect of personalty in so far as the successor became entitled by virtue of the laws of England. The converse is true: that if he was entitled to immovables abroad by virtue of English laws, then succession duty would have been payable. See the explanation in *Marlborough* (*Duke*) v. *Attorney-General* (*No. 1*).[35]

The principle of *Attorney-General* v. *Campbell*[36] applies to this case. If Lord Hatherley's words are read literally, they seem to suggest that the assets have to be brought physically to this country before duty is attracted, but that may have been said per incuriam and it is inconsistent with all the previous cases; nor does it fit the definition of " proper law " under the Act of 1949.

If the plaintiffs were right, the short answer to *Attorney-General* v. *Belilios*[37] would have been that they were outside the forum of administration anyway. That point was not taken, and throughout the immovables and the movables were treated as if they were on the same footing. Sargant L.J. left open the point whether the law could be changed by the subsequent dealings by the parties, and Lawrence L.J. said that it could not be. The authorities were also reviewed in *Marlborough* (*Duke*) v. *Attorney-General* (*No. 1*).[38] The proper law in relation to a voluntary settlement was considered in *Iveagh* v. *Inland Revenue Commissioners.*[39]

If, as the plaintiffs have submitted, the lex situs is the proper law of foreign immovables, because it governs the creation of all interests in foreign immovables, it would follow that the lex situs was equally the proper law regulating any foreign immovables purchased by way of investment. In *In re Moses*[40] the *Howe* v. *Dartmouth* (*Lord*)[41] rule was not recognised by the lex situs; the right of the widow as respects the South African immovables was governed by South African law, but that throws no light on the present question. It is not disputed that the lex situs will govern the effectiveness of a purported disposition and would

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[33] [1928] 1 K.B. 798.

[34] L.R. 1 Ch. 1.

[35] [1945] Ch. 78.

[36] L.R. 5 H.L. 524.

[37] [1928] 1 K.B. 798.

[38] [1945] Ch. 78.

[39] [1954] Ch. 364; [1954] 2 W.L.R. 494; [1954] 1 All E.R. 609.

[40] L.R. 1 Ch. 1.

[41] (1802) 7 Ves. 137*a*.

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prevail over the proper law, if different, so long as the property was retained by the trustees. Here the administration has long since been completed and the problem is the proper law of the proceeds of sale of a residuary estate.

In re Berchtold [42] is not in point, for it is not submitted that the property should be treated as movables, and, accordingly, the argument founded on the Settled Land Act, 1925, ss. 75 and 78, is not in point.

The conclusion that the proper law depends on intention gives full effect to section 28 (2) of the Finance Act, 1949, and makes it operate in accordance with the pre-existing law found in *Attorney-General* v. *Johnson* [43] as explained in *Attorney-General* v. *Belilios*.[44] It accords with common sense to say that the proper law is English in the present circumstances, and it would be an unnatural result to hold that the proper law regulating the trusts in respect of that part of the mass of the assets which represents the proceeds of foreign immovables is different from that which regulates that part of the mass representing the proceeds of English assets.

E. Blanshard Stamp followed.

[*Cozens-Hardy Horne*, intervening, referred to *Penn* v. *Baltimore (Lord)*.[45]]

Plowman Q.C. in reply. The Crown's concession that a disposition can be nullified by the lex situs comes very close to admitting that the lex situs controls the intention. *Attorney-General* v. *Campbell* [46] was not fully argued, for the respondent was not represented. That case only shows that the charge does not become effective until the property has actually been received in the United Kingdom, which has not happened in the present case. The present case is, in principle, analogous to a direct devise where it has been conceded that the proper law would necessarily be the law of South Africa.

Cur. adv. vult.

November 20. LORD EVERSHED M.R., having stated the facts substantially as set out above, read the relevant part of section 28 (2) of the Finance Act, 1949, and said: The question posed for our decision in terms of the subsection is whether the Steenbokspan property which passed (as Mr. Plowman has not disputed) on Sir

[42] [1923] 1 Ch. 192.
[43] [1907] 2 K.B. 885.
[44] [1928] 1 K.B. 798.
[45] (1750) 1 Ves.Sen. 444.
[46] L.R. 5 H.L. 524.

Elliot's death, is exempt from duty on the ground that the proper law regulating the devolution of the property or the "disposition "under or by reason of which" the property passed was the law not of England but of South Africa.

We were very properly referred to a number of cases during the argument but none was a direct authority upon the question with which we are concerned. I propose, therefore, to express my conclusion upon that question as a matter of the meaning of the language used in the section, treating that question as res integra; and later to say something upon the cases cited. But, like Upjohn J., I look first at the relevant statutory provisions as they would have affected such a problem as the present prior to the passing of the Finance Act, 1949. By section 2 (2) of the Finance Act, 1894, immovable property passing on the death of the deceased, when situate out of the United Kingdom, was only liable to be charged with estate duty if succession duty was payable in respect thereof (or would have been so payable but for the relationship of the person to whom the property passed). Liability for succession duty in such a case depended in turn upon section 2 of the Succession Duty Act, 1853, which, so far as relevant, was in the following terms: "Every past or future dis-"position of property, by reason whereof any person has or shall "become beneficially entitled to any property or the income "thereof upon the death of any person dying after the time "appointed for the commencement of this Act, . . . and every "devolution by law of any beneficial interest in property, or the "income thereof, upon the death of any person dying after the "time appointed for the commencement of this Act to any other "person, in possession or expectancy, shall be deemed to have "conferred or to confer on the person entitled by reason of any "such disposition or devolution a 'succession'; and the term "'successor' shall denote the person so entitled; and the term "'predecessor' shall denote the settlor, disponer, testator, obligor, "ancestor, or other person from whom the interest of the succes-"sor is or shall be derived."

The scope of the last-mentioned section was qualified by Lord Cranworth L.C. in the year 1865 in a case to which I shall revert when I later deal with the authorities. For present purposes, it is to be noted that the section distinguished between a present or future disposition of property, on the one hand, and on the other, a devolution by law of any beneficial interest in property. Succession duty was abolished by the Finance Act, 1949, and it cannot be doubted that section 28 (2) of that Act was designed to impose a criterion for liability for estate duty of (inter alia) immovable property situate out of the United Kingdom in substitution to that formerly contained in section 2 (2) of the Finance Act, 1894. It is, I think, no less clear (and was not disputed before us) that the distinction between devolution and disposition contained in the Act of 1949 reproduced the similar distinction in section 2 of the Succession Duty Act, which I have read; in other words, it is, in my opinion, not in doubt that whereas " devolution " was introduced to cover the passing of property upon intestacy or other process of law, by " disposition " was meant some instrument or the effect of some instrument (e.g., a will or settlement) conferring or purporting to confer beneficial interests in property. So far, therefore, as the present case is concerned, " devolution " can be disregarded, and the relevant " disposition " is that contained in or conferred by Sir Frederic's will. But the question remains, what, within the terms of the section, is the " proper " law regulating " that disposition? So stated, the problem posed is a short one; and so, in the end, I think it to be. But its difficulty is, to my mind, created in the present case by the formula used, " proper law." The words " proper law " are well understood when applied to a contract. In such a context they mean the law which the contracting parties intend to govern their contractual obligations, wherever performed. But they have a less natural significance where applied to a will.

In *Duke of Marlborough* v. *Attorney-General* (*No. 1*)[1] the phrase was applied by Lord Greene M.R. to a marriage settlement of personal property as meaning the law governing (that is, intended by the parties to the settlement to govern) the settlement. " Counsel for the duke and for the Crown," said Lord Greene M.R.,[2] " were in agreement in submitting that in " the case of a marriage settlement the question whether succes- " sion duty is payable under section 2 of the Succession Duty " Act, 1853, is to be answered by reference to the law governing " the settlement—in other words, the proper law of the settle- " ment." It seems likely enough that Parliament, when enacting the Finance Act, 1949, was intending to use the words in a similar sense. But whether or not that is so, I think it is inescapable that the words must be treated as having a sense analogous to that given by Lord Greene M.R.

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[1] [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165.

[2] [1945] Ch. 78, 82.

But the solution of the difficulty is not thereby far advanced when the formula has to be applied to immovable property outside the United Kingdom of which a testator has purported to dispose by will. Mr. Plowman's argument has been founded on the principle (enshrined in rule 85 in Dicey's Conflict of Laws) that all rights over or in relation to immovable property must in general be governed by the law of the country where the immovable is situate (i.e., the lex situs). Thus, according to Mr. Plowman's argument, whatever "disposition" the testator may purport to make as regards foreign immovables, the effect or the efficacy of those dispositions must depend upon and be controlled by the lex situs. In the case of a direct devise of a foreign immovable to A absolutely, Mr. Pennycuick did not dispute that the law regulating or controlling the devise must be the lex situs; since the devise (like a transfer out and out inter vivos) could only take effect in accordance with, and as permitted by, the local law. So it would follow that the devise of Steenbokspan by Sir Frederic to his executors would be governed or controlled by South African law.

But it was Mr. Pennycuick's argument that the conclusion is, or may be, otherwise when you find that the original devise to the executors has taken full effect according to the local law (as the evidence in the case showed), that the administration of the estate in South Africa has been completed, and that at the relevant date (i.e., Sir Elliot's death), the position was that the income of the property was being received by Sir Frederic's trustees and applied by them, under the terms of the will, as part of the general trust income; for when that stage is reached, then, according to the ordinary sense of the subsection, the property or the right to the enjoyment of the income of the property passed by reason only of the dispositions contained in Sir Frederic's will; and the law governing or regulating those dispositions was, at that stage, the law which Sir Frederic intended, according to the terms and context of his will, should govern or regulate them, namely, English law.

The difficulty, to my mind, of accepting Mr. Plowman's argument is that the consequence of its acceptance must be that in every case of a disposition by will or settlement of a foreign immovable, the proper law regulating the disposition must always be the lex situs. Mr. Plowman did not, indeed, shirk the consequence which he said was inevitable. But the conclusion seems to me to render futile the obvious and apparent intention of the subsection and is, therefore, one, in my judgment, which the court should not accept unless no other solution is possible; and, like Upjohn J., I do not think the court is under such compulsion. It is no doubt true that if and to the extent that a testator's or settlor's disposition of or in regard to foreign immovables (or the income or proceeds thereof) comes into conflict with the lex situs, the latter must prevail; and it is in that sense (according to Mr. Pennycuick) that Dicey's rule 85 must be read.

But to the extent that no such conflict arises, or where (as here) there is no conflict, and the relative rights of the persons now entitled to the enjoyment of the property or its income are determined exclusively by reference to the testator's will, then it is true to say, within the meaning of the subsection, that the proper law regulating the beneficiaries' rights is that which the testator intended, i.e., English law. In my judgment, sensible effect can and should be given to the subsection in the way for which Mr. Pennycuick contends; and, as a matter of construction of the subsection without reference to the authorities cited, it is shown that on Sir Elliot's death, the South African property passed by reason, and by reason only, of the dispositions in Sir Frederic's will relating to his general trust estate, and that the "proper law" regulating those dispositions was the law which he intended by the terms of his will (including clause 2) to regulate or govern them, that is, English law.

[His Lordship referred to the joint affidavit of the plaintiffs and a letter to the plaintiffs' solicitors from the general manager of the Colonial Orphan Chamber and Trust Co., dated August 30, 1955, exhibited to that affidavit, which said: "Although the "property is registered in the individual names of the trustees, "they held purely as trustees and, therefore, subject to the terms "of the late Sir Frederic Philipson-Stow's will from which they "derive their appointment, a copy of which will be filed in the "office of the Registrar of Deeds." His Lordship continued:]

I turn then to the question whether the conclusion which I have stated as a matter of construction of subsection (2) of the Finance Act, 1949, is inconsistent with or supported by the authorities cited to us, none of which, as I have stated, is an authority directly upon the subsection.

Mr. Plowman particularly relied upon three cases (which he cited also before Upjohn J.), namely, *In re Moses*,[3] *In re Miller*[4] and *In re Berchtold*.[5] The testator in *In re Moses*[6] had given, devised and bequeathed his real and personal estate, which included a leasehold property in South Africa, to his wife for life, and, subject thereto, in favour of other beneficiaries. The testator was a domiciled Englishman and his will was in English form. The question then arose whether the rule in *Howe* v. *Dartmouth (Lord)*[7] was applicable as regards the South African leasehold; but it was held by Swinfen Eady J. that since that rule was (according to uncontradicted evidence) not recognised or applied in South Africa, the right of the widow as respects the South African immovable property (i.e., the leasehold) must be governed by South African law, with the result that she was entitled to the enjoyment of that property for her life notwithstanding its wasting character. The judgment was a short one and depended, as I read it, upon the proposition that the validity of a testamentary disposition of a foreign immovable must be governed by the lex situs; and that, according to that lex, the gift of a life interest in the South African leasehold took effect according to its terms, i.e., so that the usufructuary was entitled to enjoy the rents in specie during her life without giving any security as to the value upon her death, and with the right to obtain an interdict against the executors (sic) if they attempted a sale.

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[3] [1908] 2 Ch. 235.

[4] [1914] 1 Ch. 511.

[5] [1923] 1 Ch. 192.

[6] [1908] 2 Ch. 235.

In re Miller[8] was concerned with the will of a domiciled Scotsman so far as it affected an English immovable, namely, real property in Park Lane, London. The will was in Scottish form, but also executed in manner required by English law, and disposed of Scottish immovable, as well as the Park Lane, property, by a gift of them in favour of A " and the heirs of his body " in fee." It was proved, as a matter of Scots law, that the addition of the words " in fee " following the phrase " heirs of " his body " had the effect of giving to the beneficiary, in addition to an estate tail (or its equivalent), certain rights of disposition. It was, accordingly, argued that in the will of a domiciled Scotsman expressed in Scottish form some similar effect should, by some appropriate means, be given to the words as they affected the Park Lane property. But Warrington J. rejected this view, holding that the effect of the devise of an English immovable must be determined by the lex situs, viz., English law, with the result that the use of the words " in fee " had no special significance, and could not limit or qualify the estate tail which was conferred effectively by the devise in favour of " the heirs of the

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[7] (1802) 7 Ves. 137.

[8] [1914] 1 Ch. 511.

"body." The judge said[9]: " . . . the incidents of the estate "which can be created in English land must be determined by "the law of the country where the land is situated and not by the "law of the country where the testator is domiciled or where "the will is made."

The two cases of *In re Moses*[10] and *In re Miller*[11] are undoubtedly authority for the proposition that any purported disposition by will (or by transfer or other means inter vivos) of immovable property in another country must be subject to the control of the lex situs in the sense that that lex will govern and determine the effectiveness of the (purported) disposition. But that proposition is, in my judgment, insufficient for Mr. Plowman's purposes. We are here concerned with the meaning of the statutory formula which imposed liability for estate duty upon "property passing" on a death if (so far as concerns the present case) the property passed by reason of a disposition of which the proper law was English. As I have earlier said, Mr. Plowman's argument appears inevitably to involve the result that all immovable property abroad, of which an English testator may in some sense "dispose," is, while unsold, exempt upon any passing from duty—a result which, if intended, could have been very simply stated. It is not in doubt (and the Crown have conceded) that as regards a direct disposition by will of foreign immovables (e.g., to the testator's executors) the lex situs will govern and must prevail. But the question here relates to a case where the administration of the testator's estate in South Africa, having long since been concluded, the income of that estate is, and has since before the date of the relevant death been, received by the trustees in England of the testator's will and applied by them as part of the general income of the estate. As such, the enjoyment of the income of the South African property passed on the death of Sir Elliot to the present tenant for life; and it did so (as I think) by reason, and by reason only, of the disposition to that effect contained in the testator's will, which dispositions were and are governed by the English law—for there is no suggestion of any conflict in this respect between South African and English law, or that South African law provided any impediment or qualification to the effectiveness of the English testamentary disposition or, indeed, that South African law, at that stage, came into the matter at all.

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[9] [1914] 1 Ch. 511, 519.

[10] [1908] 2 Ch. 235.

[11] [1914] 1 Ch. 511.

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I do not forget that in certain circumstances the law of country A may apply the law of country B and that in such circumstances it is the law of country A which nevertheless governs. But no such considerations appear to apply here. As I understand the evidence, the trustees of Sir Frederic's will have long since been registered, according to South African law, as owners of the Steenbokspan property and all their administrative duties have long since been performed. Since a date prior to Sir Elliot's death, they have regularly received the income of the property as owners. Their application of that income as part of the general estate has been solely in accordance with the directions in Sir Frederic's will; and pursuant to those directions, the right to receive that income passed on Sir Elliot's death to the present tenant for life.

The facts of *In re Berchtold* [12] were somewhat complex, but for present purposes it is sufficient to state that a domiciled Hungarian had by an effective English will disposed of immovable property in England, namely, a freehold estate in Birmingham, to trustees on trust for sale. The beneficial interest in the proceeds of sale under the will belonged at his death to a second Hungarian national, who had, however, died intestate. The question was whether the persons entitled upon that intestacy to the English immovable (which was still unsold) were to be determined according to the law of Hungary or the law of England. It was not in doubt that the question whether the Birmingham estate should be treated as immovable property or (by reason of the trust for sale) movable was to be determined by the lex situs, i.e., the law of England. If, according to that law, the property was immovable, then the devolution upon intestacy would depend upon lex situs, English law; but if the property were properly (by the lex situs) regarded as movable, then the devolution would depend upon the lex domicilii, i.e., the law of Hungary. Russell J. decided in favour of the former alternative.

In my judgment, since the case was concerned solely with the question of devolution upon intestacy, it cannot assist towards the solution of the present case, and is no authority for the view that for any purpose (including that of estate duty) the disposition by the will of the original testator had at the date of the intestate's death to be treated as governed by one law rather than another.

[12] [1923] 1 Ch. 192.

I conclude then that there is nothing in any of the authorities cited by Mr. Plowman which is inconsistent with the view that I have formed upon the meaning of section 28 (2) of the Finance Act, 1949; and I turn to *Attorney-General* v. *Johnson*,[13] which, as later explained in this court, was much relied upon by Mr. Pennycuick. The relevant facts of that case were that a testator domiciled in England had by his English will left his real and personal estate, which included a tea plantation in Assam, to trustees on trust for sale. He disposed of the proceeds of sale upon trust to pay the surplus income after providing for annuities to eight persons and the survivors and survivor of them for the period of the life of the longest-lived annuitant. The testator died in 1896. The question was whether upon the " passing " occasioned by the respective deaths in 1903 and 1905 of two of the persons entitled to the surplus income, succession duty and, therefore, by virtue of section 2 (2) of the Finance Act, 1894, estate duty, was payable in respect of the Assam immovable which remained unsold pursuant to the trustees' power to postpone the sale. Bray J. answered the question affirmatively. It was, however, stated by Lord Greene M.R. in *In re White* [14] that the grounds for the decision were obscure, and in the present case the Crown has not sought to rely upon them as they appear from Bray J.'s judgment.

But in *Attorney-General* v. *Belilios* [15] in this court the case was regarded as having been correctly decided. Lord Hanworth M.R. said [16] in the course of the argument that it appeared to be a very plain case. Sargant L.J. said of it [17]: " In *Attorney-*" *General* v. *Johnson* [18] the succession held taxable was in " property in Assam remaining unsold, but the succession was " created by an English will devising the property to English " trustees upon trust to sell and hold for beneficiaries here. " The law creating and governing the trust was English." Lawrence L.J. said [19]: " *In re Cigala's Settlement Trusts* [20] and " *Attorney-General* v. *Johnson* [21] are cases where the trusts " were established by persons domiciled in England and were " English settlements from the moment when they were made, " therefore constituting dispositions under which the benefici-" aries claimed title by virtue of the laws of England."

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[13] [1907] 2 K.B. 885.

[14] [1939] Ch. 131, 141; [1938] 2 All E.R. 691.

[15] [1928] 1 K.B. 798; 44 T.L.R. 214.

[16] [1928] 1 K.B. 798, 809.

[17] Ibid. 821.

[18] [1907] 2 K.B. 885.

[19] [1928] 1 K.B. 798, 827.

[20] (1878) 7 Ch.D. 351.

[21] [1907] 2 K.B. 885.

It is no doubt true, as Mr. Plowman argued, that the observations of the court upon *Attorney-General* v. *Johnson* [21] were obiter; and it is, of course, also true that that case arose under the Succession Duty Act and the Finance Act, 1894, and not under the Act with which we are presently concerned. Mr. Plowman further contended that the observations of this court already quoted were erroneous and should not now be followed. I should not wish to say—and it is not necessary to do so—that the language of Sargant L.J. and Lawrence L.J. should be treated as involving the extreme propositions which that language, taken literally, might be said to justify. But the language is at least persuasive authority for the view that where (as in *Attorney-General* v. *Johnson* [21] and as in the present case) the situation was that the income of a foreign immovable was being regularly received by trustees in this country as part of the general estate (that is, after the testator's estate here and abroad had been fully administered) and was being applied by the trustees according to the dispositions of the English will, then upon the death of one entitled to a share in that income, there was a succession which attracted duty under the Succession Duty Act and a passing which attracted estate duty accordingly under section 2 (2) of the Finance Act, 1894. And it is to be noted that the final words of the passage which I have cited from Lawrence L.J. reflected the language of Lord Cranworth L.C. (which I anticipated at the beginning of this judgment) in *Wallace* v. *Attorney-General.* [22] That case is not relevant upon its facts, but in the course of his judgment Lord Cranworth L.C. stated that the apparently unqualified language of section 2 of the Succession Duty Act must be treated as limited so as only to tax persons "who become entitled by virtue of the laws "of this country."

In the result, in my judgment, Mr. Pennycuick was entitled to say that prior to the abolition of succession duty and the coming into operation of the Finance Act, 1949, *Attorney-General* v. *Johnson* [23] "held the field" and should be regarded as authority for liability for succession duty and, therefore, estate duty in respect of foreign immovables where, as in such a case as the present, the income of the immovable being received by trustees of an English will as part of their general estate and being applied by them in pursuance, and pursuance only, of the disposition of the English will, the successor upon a predecessor's death "became entitled by virtue of the laws of England." And if this is right, then in my judgment it can further be said that upon the enactment of section 28 (2) of the Finance Act, 1949, and the substitution thereby of the new criterion for estate duty for that formerly contained in the Finance Act, 1894, it is reasonable to construe the language of the Act of 1949 consistently with the interpretation which had been given to the earlier legislation.

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[21] [1907] 2 K.B. 885.
[22] (1865) L.R. 1 Ch. 1.
[23] [1907] 2 K.B. 885.

One final point was taken by Mr. Plowman, namely, that by virtue of section 78 of the Settled Land Act, 1925, when applied to the special terms of Sir Frederic's will, the Steenbokspan property was not, upon Sir Elliot's death, held upon any effective trust for sale. My short answer to this point is that it makes no difference for present purposes whether it was so or not; the essential fact being that, upon and prior to Sir Elliot's death, the income of the property was in fact being received by the trustees as owners and being applied by them as part of the general income of the trust estate according to the directions in Sir Frederic's will.

In the result I think that the decision of Upjohn J. was correct and that the appeal should be dismissed.

Sellers L.J. I agree with the judgment the Master of the Rolls has just delivered, which I have had an opportunity of reading beforehand, and I too would uphold the decision of Upjohn J. and would dismiss the appeal.

Harman L.J. I have the misfortune to dissent from the conclusions arrived at by my Lords.

The words to be construed are "the proper law regulating ". . . the disposition." I agree with Lord Evershed M.R. in holding that the disposition here is the testator's will, and I accept his views both as to the origin of the words "proper "law" and the meaning to be attached to them. I feel no great difficulty in applying these words to a unilateral document such as a will, but as will be seen hereafter, they do not produce the same effect as when applied to contracts where the proper law is to be determined once for all at the contract date. In the case of a will, the proper law may, and in the instant case does, change at a time after the testator's death, and cannot be settled on the happening of that event.

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The testator here has expressly declared that his will should operate according to the law of England "so far as the case "admits," and the question is whether in the case of foreign immovables the case does so admit. The words are an acknowledgment that in many countries the law does not allow freedom of testamentary disposition. The law in South Africa apparently does allow it in this respect, but it is that law and not the English law which makes the disposition effective. It is conceded by the Crown that if the Finance Act, 1949, had been law before the testator's death, estate duty would not have been payable on the happening of that event, nor indeed on a devolution thereafter so long as the administration of the estate in South Africa was not complete. This must be because the South African law was the law regulating the disposition at those stages. It is furthermore conceded that if there had been a direct devise of the property to Sir Elliot after his mother's death, no estate duty would have been payable when the property devolved upon him because the proper law would still be that of South Africa.

It is, however, argued that there comes a point when there is a change in the proper law and, indeed, so far both parties agree. What is in dispute is the point at which this event occurs. The Crown argues, and my brethren agree, that this point had been reached before Sir Elliot's death because the administration was complete and the former tenant for life at the time of his death was receiving the rents and profits by virtue of the English will. The taxpayer argues that this point will not come until the date when, if ever, the trust for sale in the English will is carried into effect and the proceeds are transferred to this country.

It seems to me cardinal that the existence of the trust for sale in the English will has not altered the quality of the property from an immovable to a movable asset. Authority for this is *In re Berchtold*,[24] and it is, as I understand, not disputed by the Crown. The reason is that the law attaching to immovable property is the lex situs and that in that law the equitable doctrine of conversion has no part. Clearly then to this extent the law regulating the disposition is the law of South Africa. Similarly, in *In re Moses*[25] the English rule in *Howe* v. *Dartmouth* (*Lord*)[26] was excluded by the lex situs. Again in

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[24] [1923] 1 Ch. 192.

[25] [1908] 2 Ch. 235.

[26] 7 Ves. 137.

In re Miller[27] the English law prevailed in its effect upon the devise of an English immovable and prevailed over the law of Scotland where the will was made and where the testator was domiciled.

It seems to me that so long as the foreign immovable remains an immovable, it must in fact be controlled by the lex situs. The immediate reason why the present tenant for life is receiving the rents and profits is no doubt because of a direction in the English will, but that only takes effect because the South African law allows it to do so. If, for instance, that law did not recognise the provision cutting down the interest of a tenant in tail living at the death of the testator to a life interest but conferred upon him an absolute interest, that would undoubtedly prevail over the direction in the English will.

It is objected that to construe the statute in the way I have suggested is to nullify its effect in every case of foreign immovables and that it would have been much simpler, if that were the legislature's intention, to say so in so many words. I do not feel the force of this. It is conceded by the taxpayer that once the asset arrives in England, or rather perhaps when it becomes a movable, then the beneficiaries take solely by virtue of English law and that becomes the proper law. *Attorney-General* v. *Campbell*[28] is a good illustration of this, for there the foreign property had in fact been converted in obedience to the directions in the will and invested in England and, therefore, on the death of the annuitant an English succession arose, notwithstanding the fact that the testator was domiciled in Portugal and his property was originally situated there. In that case Lord Westbury in his speech said[29]: "Now, all this is an immediate consequence of the first principles of law, and the "Master of the Rolls has been misled by language which was "used by Lord Cranworth L.C. in *Wallace* v. *Attorney-General*,[30] "where the extraordinary conclusion was contended for, that "under the will of a gentleman dying domiciled abroad the first "legatee, though he was not liable to legacy duty, became "liable to succession duty under the Act. It is quite clear that "you cannot apply an English Act of Parliament to foreign "property whilst it remains one property; but after the purposes "of administration have been answered and distribution made, "if a party taking this distributive part comes to this country

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[27] [1914] 1 Ch. 511.
[28] (1872) L.R. 5 H.L. 524.
[29] Ibid. 530.
[30] L.R. 1 Ch. 1.

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"and invests it upon trusts, it assumes the character of a "British settlement and British property, and is no longer to "be dealt with as if it was merely a portion of a foreign testator's "estate to be received in the course of administration."

Similarly, in *Attorney-General* v. *Belilios*[31] the testator's property remained situate in Hongkong and it was declared that no estate duty was payable under section 2 (2) of the Finance Act, 1894. In *Attorney-General* v. *Jewish Colonisation Association*[32] estate duty was held payable because the trustee under the relevant deed in whom the assets were vested was an English company and the trusts must be executed solely under English law.

This leaves *Attorney-General* v. *Johnson*,[33] which undoubtedly decides that though the foreign property was still unsold, estate duty was payable in England. In my judgment this decision was wrong and really depended on the view of the judge that the trust for sale operated to convert the foreign property into movables—see the judgment. This is the explanation suggested by Lord Greene M.R. in *In re White*.[34] This decision was not criticised in *Attorney-General* v. *Belilios*[35] (above) but the point did not arise directly in that case and was not, I think, being considered by Sargant and Lawrence L.JJ.[36] Moreover, the decision in *Attorney-General* v. *Johnson*[37] has not much left to support it after the criticisms of Lord Greene M.R. in *In re White*,[38] and the concession which the Crown felt constrained to make here that it could not rely on the judge's view that the Assam property was an English chose in action.

I am further of opinion that the liability to estate duty under the section depends on the situation at the relevant time, which here is the death of Sir Elliot, of the property disposed of by the will and that Dicey's rule applies.

In my judgment the case does not depend upon the forum in which the trusts of the will ought to be enforced. The cases of *Sudeley* v. *Attorney-General*[39] and *In re Smyth*[40] seem to turn on the question of the forum of administration and on the view not now contended for that an English trust for sale of foreign immovables converts them into personal property and, therefore, into movables. True it is that the trusts of this will might be enforced against the trustees by a suit in England, but it could only be effective by obliging them to take proceedings in South Africa, and the ultimate sanction must lie there. Suppose, for instance, that the law of South Africa were to be altered so that the trusts of an English settlement were ordered to be disregarded so far as they related to land in South Africa, it could not be denied that South African law would prevail. It seems to me, therefore, that the law regulating the disposition remains in the last resort the South African law and that law, therefore, so long as the property remains unconverted in South Africa, is the proper law of the disposition.

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[31] [1928] 1 K.B. 798.
[32] [1901] 1 K.B. 123; 17 T.L.R. 106.
[33] [1907] 2 Q.B. 885.
[34] [1939] Ch. 131, 141.
[35] [1928] 1 K.B. 798.
[36] Ibid. 821, 827.
[37] [1907] 2 K.B. 885.
[38] [1939] Ch. 131, 141.
[39] [1897] A.C. 11.
[40] [1898] 1 Ch. 89; 14 T.L.R. 77.

Appeal dismissed with costs.
Leave granted to appeal to the House of Lords.

Solicitors: *Norton, Rose & Co.; Solicitor of Inland Revenue.*

E. D.

GOULD *v.* NATIONAL PROVINCIAL BANK LTD. AND ANOTHER.

1960
Feb. 3.
Russell J.

[1956 G. No. 1722.]

Practice and Procedure—Discovery—Default of appearance—Whether order for discovery should be made—Party improperly joined.

Practice—Parties—Joinder—Debtor to bank—Whether proper party to action by guarantor for declaration that legal charge and guarantees were invalid.

The plaintiff executed a legal charge on his house and entered into three guarantees for the purpose of guaranteeing the repayment to a bank of certain sums owed to the bank by his son-in-law. The plaintiff subsequently brought an action against the bank and his son-in-law for a declaration that the legal charge and the guarantees were invalid and ought to be set aside. The bank entered an appearance and delivered a defence; but the son-in-law did neither. The plaintiff applied for an order for discovery against the son-in-law:—

Held, that the son-in-law was not a proper party to the action because he was not legally or equitably interested in the relief

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

claimed; and that, therefore, discovery should not be ordered against him for, if it was, it would mean that he was being retained as a party for the purpose of discovery.

Heatley v. *Newton* (1881) 19 Ch.D. 326 and *Codd* v. *Delap* [1906] W.N. 57 considered.

Per curiam (obiter): An order for discovery should not be made against a defendant in default of appearance because there is no issue, at that stage, between the plaintiff and that defendant and, therefore, there is nothing in relation to which discovery can be ordered.

PROCEDURE SUMMONS.

On October 20, 1950, the plaintiff, Herbert Gould, executed a guarantee of the payment to the first defendant, National Provincial Bank Ltd., of all sums of money then or thereafter due to it from the second defendant, the plaintiff's son-in-law, up to the amount of £1,500, and a legal charge upon his house to secure all sums of money then or thereafter due to the bank from the plaintiff. On May 11, 1951, the plaintiff executed a similar guarantee limited to an additional amount of £750; and on September 1, 1952, he executed a third similar guarantee limited to an additional amount of £900. On November 6, 1952, the bank called upon the second defendant to pay all moneys due from him to it; and by notice in writing dated February 16, 1953, the bank required the plaintiff to pay to it the sum of £3,150 alleged to be due to it on the security of the legal charge. On February 3, 1956, the bank issued an originating summons against the plaintiff for possession of the plaintiff's house. On October 1, 1956, the plaintiff issued a writ against the bank (to which his son-in-law was later added as a defendant by amendment) claiming a declaration that the legal charge and the three guarantees were invalid and ought to be set aside; alternatively, rescission of the documents or the transactions affected thereby, and delivery up of the documents for cancellation. The bank's originating summons was adjourned pending the determination of these proceedings. The bank entered an appearance to the writ and delivered a defence. The second defendant neither entered an appearance nor delivered a defence. On the summons for directions in the action, the plaintiff asked for an order for discovery of documents against the second defendant; the master adjourned that point to the judge.

A. C. Sparrow for the plaintiff. Prima facie, every party to an action is entitled to discovery of documents against the other parties to the action; and every party is also subject to discovery: R.S.C., Ord. 31, r. 12. The words "any other party" in the rule mean what they say and must, therefore, include a party in default of appearance. R.S.C., Ord. 13, r. 12, which provides that, where a party is in default of appearance, the action may proceed as if such party had appeared, contains no limitation. There is, therefore, nothing in either of the two relevant rules to support the view that discovery will not be granted against a party in default of appearance. There is nothing in Bray on Discovery on this question.

If a party has been properly joined initially, he can be retained as a party to the action for the purpose of discovery: *Heatley* v. *Newton*.[1] The second defendant was properly joined as a party to the action. He is interested in the relief claimed in that the documents which are the subject-matter of this action are three guarantees of his account with the bank and a legal charge executed in support of those guarantees. If those documents are set aside, the second defendant will be materially affected.

The second defendant cannot avoid giving discovery merely by doing nothing. So long as he does not come before the court and submit to judgment being given against him on the whole of the plaintiff's claim, there is still an issue to be tried between him and the plaintiff; and the plaintiff is entitled to discovery relevant to that issue. Where a defendant is in default the court has power to make the full order claimed in the writ. That power must include power to make any lesser order, such as discovery, which is necessary for the conduct of the action.

Robin Dunn for the bank. The second defendant is not a proper party to the action, and, therefore, discovery should not be ordered against him. He was not a party to any of the documents which are the subject-matter of these proceedings, and he has no direct interest in them. The guarantees do not in any way affect his liability to the bank. The validity of the guarantees and of the legal charge, which is the sole issue in this action, is a matter which concerns only the bank and the plaintiff, and not the second defendant. If he is not a proper party to the action, he cannot be retained in the action merely for the purpose of giving discovery to the plaintiff to enable him to prosecute his claim against the bank: *Heatley* v. *Newton*.[2]

An order for discovery will not be made if there is no issue between the party seeking discovery and the party against whom it is sought. That rule applies even if the party against whom the order is sought to be made was, at the outset, a proper party to the action: *Codd* v. *Delap*.[3] There is no issue between a plaintiff and a defendant who is in default of appearance because such a defendant must be taken to admit all the allegations in the statement of claim; and, therefore, while he is still in default, there is no issue between him and the plaintiff to which discovery can be directed.

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[1] (1881) 19 Ch.D. 326.

[2] Ibid. 337.

Even if an order for discovery can be made against a defendant who is in default of appearance, documents which relate to the health of the second defendant's business are irrelevant to the matters in question in this action.

Sparrow replied.

The second defendant did not appear and was not represented.

RUSSELL J. This is an application by the plaintiff in the action for discovery of documents against the second defendant who is in default of appearance.

[His Lordship referred to the facts and continued:] Without going into great detail, the plaintiff says that he was misled into executing these documents by fraudulent misrepresentation on the part of a representative of the National Provincial Bank. There is also an allegation of undue influence and abuse of a relationship which involved a duty on the part of the bank to the plaintiff.

The plaintiff wants discovery from the second defendant of documents relating to the second defendant's business on the grounds that such documents would be relevant to an issue on the pleadings of this nature; that it is alleged that the bank's representatives in effect said that the second defendant's business was a nice profitable business, and that that was not the fact because the business was at all material times in serious difficulties. The plaintiff says that the documents in the possession, power or control of the second defendant will assist the court in determining whether that allegation is or is not correct. It is the first essential step in the allegation of fraudulent misrepresentation by or on behalf of the bank.

I was referred to R.S.C., Ord. 31, r. 12, which says: "Any "party may . . . apply to the court or a judge for an order directing any other party to any cause or matter to make discovery "on oath of the documents which are or have been in his

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[3] [1906] W.N. 57.

"possession or power, relating to any matter in question therein." Mr. Sparrow, for the plaintiff, says that the second defendant is a party, and so is the plaintiff, and there is nothing in that rule which provides that it does not cover a case where one of the parties is in default of appearance and defence. He also points out that R.S.C., Ord. 13, r. 12, is in these terms: "In all "actions not by the rules of this Order otherwise specially "provided for,"—which would be, for example, an action of this character—"in case the party served with the writ does not "appear within the time limited for appearance, upon the filing "by the plaintiff of a proper affidavit of service, and if the writ "is not specially indorsed under Order III, Rule 6, of a statement "of claim, the action may proceed as if such party had "appeared." Mr. Sparrow says that means that the action, in all respects, may proceed as if the party had appeared and, therefore, equally in that order there is nothing to suggest that discovery cannot be obtained against the party who is in default of appearance.

In my view, there is, in this case, what I may describe as a special and earlier point. If the second defendant be not a proper party to the proceedings, the question is should discovery be ordered against him because in fact he has remained a party. If he is not a proper party, I am clearly of opinion that discovery should not be ordered since it would mean this, that he would be being retained as a party for no purpose other than discovery. I consider that the second defendant in this case is not a proper party.

The relief claimed is, first, "a declaration that the legal "charge . . . and the three guarantees . . . are invalid and ought "to be set aside." The second defendant is not a party to either the legal charge which is between the plaintiff and the bank, or to any of the three guarantees which are guarantees of the second defendant's overdraft with the bank. The second claim is: "Further or in the alternative rescission of the said documents "or the respective transactions effected thereby." The third is: "Delivery up of the said documents for cancellation." The second defendant, in my view, has no legal or equitable interest in either the legal charge or any of the three guarantees. I think that that can be tested by inquiring whether, should the plaintiff and the bank choose, as a matter of agreement between them, to tear up the guarantees or the charge by way of legal mortgage, the second defendant would have any say in the matter at all, either in law or in equity. If, as I think, he would have no say, I cannot see how he can be concerned in an action whose only purpose, in effect, is to seek on the one hand the tearing up or destruction of these documents, or on the other hand, their preservation and the establishment of their validity.

It is suggested by Mr. Sparrow that the second defendant is interested in this way, that it is his banking account which is being guaranteed and the legal charge is in support of those guarantees. Of course, in a sense, he is interested; but it seems to me that, for a person to be a proper party to an action of this nature, it is essential that he should be legally or equitably interested in some part of the relief claimed. That view of this particular case seems to represent the justice of the matter and satisfies me that an order for discovery should not be made against the second defendant.

There is another aspect of the matter which is more general. Mr. Dunn, for the bank, says that no discovery should be ordered against a defendant who is in default of appearance since ex hypothesi there is no issue between the plaintiff and such a defendant because no part of the statement of claim has been put in issue by the defendant; and that that must apply to any such case as this. He says if there is no issue between the plaintiff and the second defendant in these proceedings there can be no discovery ordered as between the plaintiff and the second defendant. Mr. Sparrow, for the plaintiff, says that is not so unless there has been in some shape or form a submission to the claim or an admission of the facts. In this connection reference was made to two cases. The first is *Heatley* v. *Newton*,[1] in which "The plaintiff, who had bought property at an auction and paid "a deposit to the auctioneers, brought an action against the "vendors and the auctioneers to have the contract rescinded, "the deposit repaid with interest, the costs of the action paid, "and for damages. The statement of claim alleged that all, or "nearly all, of the biddings previous to that of the plaintiff were "fictitious, and were either biddings by the vendors or their "agents, or were announced by the auctioneer without any "bidding having in fact been made. The auctioneers applied for "liberty to pay the deposit into court, and to have the action "dismissed against them on such payment being made. The "Master of the Rolls made an order that, the vendors under-"taking to pay the auctioneers their costs of the action without "prejudice to how they should ultimately be borne, and to pay

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[1] (1881) 19 Ch.D. 326.

"any interest and damages to which the plaintiff might be held "entitled, and the auctioneers undertaking, in the event of the "vendors not carrying out their undertaking, to pay to the plaintiff interest on the deposit up to the time of payment into "court, and the costs of the action up to and including that "application in the event of the court holding the plaintiff "entitled to such interest and costs, the auctioneers should be "at liberty to pay the deposit into court, and that all further "proceedings against them should be stayed: *Held*, on appeal, "that the order must be discharged, the auctioneers not having "submitted to give the plaintiff all the relief which he could in "any event be entitled to against them, for that if the allegations in the statement of claim were established the plaintiff "would be entitled to have judgment against them for the deposit "with interest, and to have an order for costs of the action "against all the defendants." Pausing there, it is to be observed that that case was not one in which there was no defence delivered. The defendant auctioneers were simply saying that the proceedings should be stayed against them on terms which would be less than the plaintiff would be fully entitled to if he succeeded in the action. Two passages in the judgments were referred to in argument. The first is where Baggallay L.J. said [2]: "Another point, upon which I do not feel so clear, was "strongly pressed by Mr. Crossley, that the plaintiffs were "entitled to keep Fox & Bousfield before the court, apart from any "question of personal pecuniary responsibility, upon the ground "alone of being able to obtain discovery from them which would "enable them to establish their case as against the other defendants. I am not prepared to admit, as a general principle, that "a plaintiff is entitled to have persons kept before the court as "defendants, that they may aid him in obtaining discovery from "the other defendants, but here the two things are so mixed up "together that, as it appears to me, enough has not been done on "the part of Messrs. Fox & Bousfield, as regards the plaintiff's "interest, to entitle them to be dismissed from the suit, or to "entitle them to have the proceedings stayed against them." That passage seems to be rather neutral, but Lush L.J. said [3]: "Now, the order in question exonerates Messrs. Fox & Bousfield "from the time they made the payment into court from all "liability except interest and costs up to that time, and it "compels the plaintiff to take the undertaking of the vendors that

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[2] 19 Ch.D. 326, 336.

[3] Ibid. 337.

"they will be answerable for all damages to which the plaintiffs "may be held entitled. I do not think that the court has a "right to do this, seeing that the auctioneers were originally "properly joined as defendants in the action. I quite agree that "you cannot claim to retain parties as defendants in a suit merely "because you want to interrogate them; but it appears to me "that where they are properly made defendants it is a ground "for not letting them off summarily, that there is a very great "advantage accruing to the plaintiffs from being at liberty to "interrogate them instead of simply calling them as witnesses at "the trial." Then he continued to deal with the matter in relation to the form of discovery which is involved in interrogatories rather than that which is involved in the ordinary discovery of documents.

The other case, referred to by Mr. Dunn, was *Codd* v. *Delap.*[4] In that case the plaintiff sued Delap and others for a declaration "that the plaintiff was beneficially entitled to "50 fully-paid-up shares in a certain railway company. The "statement of claim (amongst other things) set out the plaintiff's "title to the shares, and alleged that the shares were at the "commencement of the action registered in the books of the company in the name of the defendant Stevens as mortgagee, and "that the defendant Delap claimed to be beneficially entitled "to them as against the plaintiff. The defendant Stevens (who "was the solicitor of the defendant Delap, and was made a "defendant only with respect to these shares) by his defence "admitted the allegations in the statement of claim in relation to "these shares, and disclaimed all interest whatever in them. An "application by the plaintiff, by summons in chambers, for leave "to administer interrogatories to the defendant Stevens with "respect to these shares and other matters having been dismissed "by the judge, the plaintiff now moved to discharge the order." It was argued: "Stevens was properly made a defendant, and "could not avoid giving discovery by saying that he now claimed "no interest in the shares. It was impossible for the plaintiff to "get on unless he could obtain answers from Stevens as to what "he said and did on certain occasions." Farwell J. refused in his discretion to grant the application, saying[5]: "There was now "no issue between the plaintiff and Stevens, but the plaintiff "desired to interrogate Stevens to see if his answers would help "him. If the interrogatories were answered, the plaintiff could

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[4] [1906] W.N. 57.

[5] Ibid. 58.

"not read the answers at the trial against any of the other "defendants. The plaintiff, in fact, was seeking to obtain from "Stevens a statement on oath of what his evidence would be at "the trial of the action. It was a novel application, and must "be dismissed with costs." This is also a case involving interrogatories rather than discovery of documents; but I find support for my decision to decline to order discovery of documents having regard to the fact that the second defendant, in my view, is not a proper party and, therefore, cannot be retained as a party for the purpose only of discovery, in the judgment of Lush L.J. in *Heatley* v. *Newton*,[6] where he said[7]: "I quite agree that you "cannot claim to retain parties as defendants in a suit merely "because you want to interrogate them."

On the other hand, it does not seem to me that either of those cases are quite in point on the question here, whether discovery can be ordered against a defendant who is in default of appearance and so long as he is in default of appearance. As suggested by Mr. Dunn, there cannot be said to be any issue between the parties on which discovery against the second defendant should be granted and, therefore, there should not be any discovery. Mr. Sparrow points out that there is nothing in Bray on Discovery as to whether discovery can be ordered against a defendant who is in default of appearance. He has also argued that since the court in such circumstances would have power to make the full order claimed in default of defence, then that power to make the greater order must include the power of making a lesser order, such as the order for discovery. For my part, I do not follow that at all. It seems to me that an order for discovery is to be considered like any other order of this type. On the supposition that the court in such circumstances is in a position to make a full order and to grant the full relief claimed against the particular defendant, it seems to me that, as between the plaintiff and that particular defendant, no relief by way of discovery is required. It is not actually necessary for my decision in this case, but I think that it would be right, if a defendant is in default of appearance, to say that there is no issue at that stage between the plaintiff and that defendant, and that, therefore, there is nothing in relation to which discovery is or should be ordered. It is perfectly clear that at a later stage the defendant might get leave to enter an appearance and deliver a defence on terms; but, if he were to do so, then at that stage there would be an issue, and at that stage discovery could be ordered.

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[6] 19 Ch.D. 326.

[7] Ibid. 337.

In my view, the application for discovery against the second defendant should be refused.

Application refused. First defendant's costs in any event.

Solicitors: *Hewitt, Woollacott & Chown for Southall & Co., Birmingham; Wilde, Sapte & Co.*

In re LEVY, DECD.

C. A.
1959
Oct. 29, 30;
Nov. 2, 20.

BARCLAYS BANK LTD. *v.* BOARD OF GUARDIANS AND TRUSTEES FOR THE RELIEF OF THE JEWISH POOR AND OTHERS.

[Plaint No. 1958, L. No. 7.]

Lord Evershed M.R., Sellers and Harman L.JJ.

Will—Construction—Absolute gift or gift of interest—Charity, gift to—Gift of income to charity indefinitely—Whether carries right to corpus—Testator's intention.

Charity—Gift of income—Indefinite gift in perpetuity—Whether charity entitled to capital.

Trust and Trustee—Sole beneficiary—Direction—Charity—Whether gift in perpetuity of income to charity covers corpus.

A testator gave his residuary estate, after the death of the survivor of his brothers and sister, to the official trustee of charitable funds on trust to form a fund to be known as "the L. family "charitable trust." The income of the fund was to be divided into eight equal parts and paid as directed in the will to six named charities. On the question whether the beneficiaries were entitled to the corpus:—

Held, (1) that in the case of a gift to a charity for its general purposes, it should not be inferred that an indefinite gift of income carried a right to the corpus, for such a gift could be enjoyed by the charity to its fullest extent in perpetuity. The existence of any such right depended on the true interpretation of the particular gift.

In re Morgan [1893] 3 Ch. 222 and *Wharton* v. *Masterman* [1895] A.C. 186 distinguished.

Philipps v. *Chamberlaine* (1798) 4 Ves.Jun. 50, as explained in *In re Lawes-Wittewronge* [1915] 1 Ch. 408, 412, considered.

(2) That, on the true construction of this gift, no intention was discernible that the beneficiaries were to be entitled to the corpus of the fund.

Per Lord Evershed M.R. It is not correct that the canon of construction takes effect independently of the wishes of a testator as expressed in his will. A right to corpus cannot be inferred to save a gift which would be otherwise void for perpetuity if, on its true construction, the gift is inconsistent with that inference.

Decision of Danckwerts J. reversed.

APPEAL from Danckwerts J.

The following statement of the facts is taken substantially from the judgment of Lord Evershed M.R.: By his will dated August 12, 1936, the testator, George Levy, provided for the disposition of his residuary estate as follows: Clause 11: "And "I declare that my trustees shall stand possessed of the income "of my trust estate upon trust to pay the said income to my said "two brothers and my said sister in equal shares during their "lives and after the death of the survivor of them my trustees "shall stand possessed of the capital as well as the income of the "residue of my estate upon trust to pay or transfer the same to "the Official Trustee of Charitable Funds upon the trusts following "relating thereto namely: The capital shall form a fund to be "known as the 'Levy Family Charitable Trust' and the income "thereof shall be divided into eight equal parts and shall be paid "as follows: (a) As to two equal parts thereof to the London "Jewish Hospital. (b) As to two further equal parts thereof to "the London Hospital, Whitechapel Road. (c) As to one further "equal part thereof to the Jewish Board of Guardians. (d) As to "one further equal part thereof to the Jewish Hospital and "Orphan Asylum at Norwood. (e) As to one further equal part "thereof to the Jewish Home for Incurables at Tottenham. "(f) As to the remaining one equal part thereof to St. Thomas' "Hospital, London."

By clause 15: "I declare that no beneficiary taking any share "or interest under this my will whether absolutely contingently "or in reversion shall whether during the lifetime of my family "trustees or after their death challenge call into question or "interfere with anything that my trustees may have done or "which they may have omitted to do in the exercise of the very "wide discretions given by me to my trustees by this my will in "connection with my estate and I declare that in the event of "any such challenge calling into question or interference then "the benefit taken by any such person or persons or charity or "charities under this my will shall be forfeited and in the event "that such challenge calling into question or interference shall "be made by any one or more of the ultimate charity trustees or "charity beneficiaries interested in the ultimate gift under this "my will then the interest taken by any such ultimate charity "trustee or charity beneficiary who shall make such challenge "call into question or interfere shall be forfeited and the capital "and income representing such interest shall pass to the trustees "for King Edward's Hospital Fund."

The testator died on July 26, 1940, and the survivor of his brothers and sister died on October 16, 1955, having left wills in terms which for present purposes were identical so that all four funds devolved in the same way.

On January 1, 1958, the trustees of the will, Barclays Bank Ltd., took out a summons asking whether the charitable institutions, or in some cases their successors, to whom shares of income of the residuary estate had been bequeathed were each absolutely entitled to the share of the capital producing the respective share of income. Before Danckwerts J. a further question as to the validity of clause 15 was also raised. Danckwerts J. decided that the institutions were entitled to the appropriate shares of the capital and that clause 15 was invalid. The Attorney-General appealed against the first part of the decision, but the invalidity of clause 15 was not appealed against, though counsel for the Attorney-General submitted (rightly as Lord Evershed M.R. said), that regard might be had to the language of clause 15 as an aid to the construction of clause 11.

Denys Buckley for the Attorney-General. It is a well-recognised rule that a gift to an individual of income in perpetuity carries with it the right to the capital which produces that income. The rule can be explained on the basis of the testator's presumed intention. If an individual is to have the full enjoyment of the income in perpetuity no beneficial interest is left in anyone else. The capacity to produce benefit is absorbed by the gift and, as the individual is not himself perpetual, the only way in which he can get the full benefit of the gift is by anticipating the future income. In a sense he sells his right to that income to the trustee in return for a transfer of the capital. In *Philipps* v. *Chamberlaine* [1] it was said that it should be presumed that a testator who makes a gift of residue does not intend to die intestate. [Reference was made to *In re Lawes-Wittewronge* [2] and to

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[1] (1798) 4 Ves. 50, 58.

[2] [1915] 1 Ch. 408.

Fearne's Contingent Remainders, 10th ed. (1844), vol. 1, p. 465. It might be said that the same rule should apply to a body corporate because such a body can do anything that an individual can do. The rule has, however, no necessary application to a charity, for, although no one but the charity has any interest in the property, the charity is perpetual and enjoyment in perpetuity of the income of an endowment fund is permitted by law. When money is given by will on trust for a charitable purpose the testator would not be intending to benefit any particular person but a fluctuating body of beneficiaries, and it would defeat his intention if the capital were to be realised and distributed at his death between the persons who happened to be entitled at that particular time.

It depends on the terms of a particular gift whether a donor intends to create a perpetual trust of income or not. In the present case the intention is plain. The fund was to be transferred to the Official Trustee of Charity Funds for the perpetual endowment of the named charities. The interposition of the Official Trustee is not conclusive, but it suggests an intention of perpetual endowment. The capital had to remain intact because the fund could not otherwise be a "memorial." The forfeiture clause is another indication of the intention, for that clause was evidently intended to operate indefinitely.

[HARMAN L.J. In the forfeiture clause the testator made it clear that the King Edward's Hospital Fund was to take the capital.]

Where a charity is the sole beneficiary it may be able to require the trustees to transfer the capital to it to be held by it on the same trusts, but that is not the present case. In *In re Clark's Trust*,[3] followed in *In re Clarke*,[4] it was held that where there was an indefinite gift of income to an incorporated, but non-charitable, body, the donee was not entitled to call for the capital. If the rule applied otherwise than to an individual donee, it would have been applicable in *In re Macaulay's Estate*.[5] In *In re Morgan*[6] the reasons for the decision of Stirling J. are not reported. There was an appeal but only on the first and different point. One observation of Lindley L.J.[7] shows, however, that he would probably not have agreed with Stirling J.'s decision on the second point if it had been appealed. *In re*

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[3] (1875) L.R. 1 Ch. 497.

[4] [1901] 2 Ch. 110; 17 T.L.R. 479.

[5] [1943] Ch. 435n.

[6] [1893] 3 Ch. 222.

[7] Ibid. 227.

Morgan[8] is not directly in point, for although Stirling J. held that the charities were entitled to the capital, it did not follow that they were entitled to spend it. In *Wharton* v. *Masterman*[9] the present question did not arise. The issue was whether the charities, who were absolutely entitled to the corpus subject to the rights of the annuitants in the income, could stop accumulations of surplus income during the lifetime of the annuitants. It was held that they could. Once they got the money it was plain that they were entitled to spend it.

In *In re Jones*[10] the points at issue in this case did not arise. It is submitted that *In re Pellew*[11] was wrongly decided. The decision can at most only be supported in application to a case where the gift is to a corporate body for its general purposes. Neither the reasoning nor the decision can apply to a gift to an unincorporated charity. In the present case some of the charities are incorporated and others are not, but it is inconceivable that the testator should have intended that a distinction should be made between them. In *In re Meyers*[12] gifts to an unincorporated hospital were held to be gifts for the purposes of the hospital and, therefore, that the fund was to be payable to the persons carrying on those purposes. It was not to be distributed. If the appellant's submission is not right, it is difficult to see how a permanent endowment in favour of a charity can be made effectively in future.

R. S. Lazarus Q.C. and *Raymond Walton* for the first defendants. The position of this charity (which is incorporated under the Charitable Trustees Incorporation Act, 1872), approximates to that of an unincorporated charity with the qualification that only the corporate body of trustees can act for it. The board has a licence in mortmain and any gift to or on behalf of the charity is to be held as a gift to the corporation. Where, as in this will, several bodies are grouped together, no distinction should be drawn between those which are incorporated and those which are not on the issue in the present case.

The earliest reported case on the rule that a gift of the whole produce carries the corpus is *Kerry* v. *Derrick*,[13] which supports Fearne's statement that the principle was originally decided in relation to real estate and was then carried over into leaseholds.

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[8] [1893] 3 Ch. 222.

[9] [1895] A.C. 186.

[10] [1950] W.N. 346; 66 T.L.R. (Pt. 2) 51; [1950] 2 All E.R. 239.

[11] Unreported, Nov. 10, 1953.

[12] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.

[13] (1602) Cro.Jac. 104.

It is appreciated that the court would lean against defeating the testator's intention, and it is conceded that if the donees can spend the corpus the testator's desire to have a family fund will be defeated. But the testator's intention cannot govern what has actually been given by the language he has used in the gift. His intention could have been achieved by giving the trustees a limited interest defeasible if capital was resorted to. The principle applies notwithstanding the intervention of a trustee: *Haig* v. *Swiney*.[14] No distinction can be made between an individual beneficiary and a charitable beneficiary. *Wharton* v. *Masterman*[15] was a statement of principle in general terms.

If all the beneficiaries act together they can say that between them they are entitled to all the income of the fund and, therefore, to the capital on the *Saunders* v. *Vautier*[16] principle, but, even if one deserted, it would not disentitle this charity from claiming the share of capital producing the income given to it. If one of the charities interested sold their rights they would necessarily sell the capital.

[HARMAN L.J. No one could control a gift of income to an individual, but the Attorney-General could say that the income of a gift to charity should be used for ever for general charitable purposes.]

On the terms of the gift the charity is entitled to use the capital because the gift, as a gift, must necessarily be a gift of an aliquot share of the corpus of the fund and there is no prohibition in the will which says that what the charity receives shall be restricted in any way.

R. W. Goff Q.C. and *L. H. L. Cohen* for the Stepney Group Hospital Management Committee, the second defendants. The London Jewish Hospital has been incorporated at all relevant times. This is not a case where the testator died after the National Health Service Act came into force. The gift had already taken effect when the hospital passed into the control of the Hospital Management Committee. [*In re Meyers*[17] and the National Health Service Act, 1946, ss. 6, 7, 59 and 60, were referred to.] It is not denied that the testator may have intended that the capital should be retained, but this case does not turn on a question of intention. As a matter of law a gift of this nature is a gift of the corpus. The fact that it is given to a corporation established for charitable purposes is irrelevant. This is an indefinite gift absolute and unqualified to the six beneficiaries and no gift was made to anyone else. The gift to the official trustee was not beneficial. The capital is just as much undisposed of as if the gift had been to an individual, and there is no reason why the ordinary rule should not be applied. It applies equally where the gift is to an individual, a charity or a corporation.

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[14] (1823) 1 Sim. & St. 487.

[15] [1895] A.C. 186.

[16] (1841) 4 Beav. 115; affd. Cr. & Ph. 240.

[17] [1951] Ch. 534.

The testator's intention is repugnant to the gift which he has made, and the beneficiaries can take the gift and defeat his intention, as in *Wharton* v. *Masterman.*[18]

One has to decide whether the gift is on trust or for the purposes of the charity. This was a gift to the six bodies absolutely and not for specific purposes. The official trustee was given the fund to pay to the six charities, not on any trusts. The effect of that gift is an absolute gift of the capital. In fact they are subject to limitations in the way they can use it, but there is no reason for excluding the rule of law and arriving at the conclusion that this is a gift on trust, which it is not. This was a gift to the charities for all the purposes of those bodies.

Since this is a gift to a charity, there is no question here, as there was in *In re Clark's Trusts,*[19] of the gift infringing the rule against perpetuities. Nor is this case within the principle of *In re Clarke.*[20]

John Pennycuick Q.C. and *Raymond Walton* for the Board of Governors of the London Hospital and the Board of Governors of St. Thomas' Hospital, the third and fourth defendants. The London Hospital and St. Thomas' Hospital are in a different position from that of the other respondents. The London Hospital operated under a Royal Charter until the National Health Service Act, 1946, came into operation. The purposes of St. Thomas' Hospital were conducted under the charter of the City of London, which in effect held any gift to the hospital for the charitable purposes of the hospital. The London Hospital is in the same position as a natural person and, unless prohibited by its charter, can do anything which a natural person can do: *Wenlock* (*Baroness*) v. *River Dee Co.*[21] The position of an eleemosynary charity founded by Royal Charter is different from that of a charity not so founded. The prerogative powers of the Crown as parens patriae do not extend to charities so founded. [Reference was made to Tudor on Charities, 5th ed., pp. 174, 175, 178, 194, 196.] The London Hospital does not hold its property as a trustee but as a person: *Ex parte Berkhampstead Free School.*[22] These hospitals are in the same position as a natural person and are entitled to call for the capital producing their shares of income. A right to a share of income in perpetuity confers a right to call for the capital of that share. That that is the general rule appears from the decision in *In re Marshall.*[23] Cozens-Hardy M.R.[24] in that case stated that the rule will be applied unless there are special circumstances, as in the case of a gift of shares in land. Here all the charities are entitled to have their shares of capital transferred to them.

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[18] [1895] A.C. 186.
[19] L.R. 1 Ch. 497.
[20] [1901] 2 Ch. 110.
[21] (1883) 36 Ch.D. 675n., 685.

Nigel Warren Q.C. and *J. W. Mills* for the Jewish Orphanage and the Home and Hospital for Jewish Incurables, the fifth and sixth defendants. The unincorporated charities should be treated in the same way as the other charities. There should be equality between these beneficiaries. If the incorporated charities are entitled to a transfer of capital, so are the unincorporated charities. In *Leahy* v. *Attorney-General for New South Wales*[25] Viscount Simonds said that an unincorporated association must be regarded for many purposes as a continuing entity.[26] [Reference was made to *In re Clarke*[27] and *In re Macaulay's Estate.*[28]] As regards the rule against perpetuities, there is no distinction between incorporated and unincorporated charities. If the incorporated charities are entitled to be paid their shares, so are the unincorporated charities.

L. J. Morris Smith for the King Edward's Hospital Fund for London, the seventh defendant, took no part in the discussion, it being conceded that the Fund was not interested in the question before the court.

Denys Buckley in reply. All the charities should be treated alike.

Cur. adv. vult.

November 20. LORD EVERSHED M.R. (read by Sellers L.J.), having stated the facts substantially as set out above, continued: Danckwerts J. decided the first question adversely to the Attorney-General. He relied on the well-established proposition that an indefinite gift of income to an individual carries the right to corpus, and he held that there was, at any rate in the present case, no valid distinction in that respect between an individual and a charitable institution: he therefore concluded that since the gifts in favour of the charities were, in his view, merely indefinite gifts of income, it followed that the charities were entitled to call for distribution of the corpus.

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[22] (1813) 2 V. & B. 134.

[23] [1914] 1 Ch. 192.

[24] Ibid. 199.

[25] [1959] A.C. 457; [1959] 2 W.L.R. 722; [1959] 2 All E.R. 300.

[26] [1959] 2 W.L.R. 722, 730.

[27] [1901] 2 Ch. 110.

[28] [1943] Ch. 435n.

It may be stated here that if indefinite shares of income are given to a number of individuals, they might also claim payment of the corpus on the ground that, being the only persons beneficially interested in the property, they could put an end in any event to the trusts. The question was raised during the argument in this court whether these charities might not, in like manner, claim to put an end to the trusts, and on that basis require payment of the corpus. An answer to that suggestion, however, is that those representing the last two charities, namely, the Jewish Orphanage and the Home and Hospital for Jewish Incurables, had never joined, and would not now seek to join, with the other four charities in preferring such a claim. On their part, Mr. Warren said that he was content to receive, as he suggested was the testator's intention, the proportionate two-eighths shares of the income in perpetuity, claiming only that if the other four charities were entitled to payment of their proportionate shares of corpus, then that his clients also should be similarly treated. It follows that there is no ground for supporting Danckwert J.'s judgment on the basis that all the charities interested were jointly claiming to put an end to the trusts.

On the appeal before us a number of cases were cited which had not been cited before the judge; and to some of these I shall presently allude. There was also a special point taken on behalf of the London Hospital that since it is a body corporate by virtue of a Royal Charter, it should, in any event, be treated as in pari materia in all respects with an individual donee, and so should be entitled to payment of two-eighths parts of corpus, whatever might be the answer as regards the remaining charities. As regards these remaining charities, there is some differentiation in constitution. For example, the first defendant (being the charity called in the will "the Jewish Board of Guardians") has a corporate trustee though the charity is itself unincorporated. The second defendant, the Stepney Group Hospital Management Committee, now stands in the place of the London Jewish Hospital (a corporate charity at the testator's death) by virtue of certain provisions, including particularly section 60 (1) (*b*) of the National Health Service Act, 1946. St. Thomas' Hospital is in a different case from the London Hospital, for it appears that the

City of London, which was incorporated by Royal Charter in the sixteenth century, conducts under the charter the purposes of St. Thomas' Hospital, so that the City may be regarded as holding any property given to the hospital for the charitable purposes of the hospital. I have already said that the Jewish Orphanage and the Home and Hospital for Jewish Incurables are unincorporated charities. In the event, however, I think no relevant distinction can be drawn between any of the charities other than the London Hospital.

Mr. Buckley in his argument accepted, as he had to do, the rule in regard to indefinite shares of income given to individuals, but contended that such rule had no application, or no necessary application, to the case of charities. The rule as regards individuals is, according to Mr. Buckley, based on the principle that a testator making an indefinite gift of income to an individual must intend that such individual should have the fullest enjoyment of the income: and that it followed, accordingly, that there could be no one else save the specified individual interested in the property; and, moreover, since the individual was not himself perpetual, the full enjoyment intended could only be achieved if the individual could call for the capital. If this view is right, then, according to the argument, it has no necessary application to a charity. True it is that no one other than the charity has any interest in the property: but the charity is perpetual and enjoyment in perpetuity of the income does not require anticipation on the part of the charity. Further, a testator making a gift of income in perpetuity to a charity may fairly be held to intend a benefit to a varying class of persons from time to time.

Mr. Buckley was able to produce authority clearly supporting the first part, at any rate, of his proposition as regards individuals, namely, the absence of any other right in anybody but the named individual to the fund—for example, *Philipps* v. *Chamberlaine.*[1] But it seems true to say that there is no judicial statement in the books supporting the reasoning that an individual, not being perpetual, can only enjoy perpetual income by anticipation, that is, by calling for capital. Yet I think this second part of Mr. Buckley's proposition must follow as a matter of logic from the first part. If I give the income of a fund without qualification to A, then A is not, as a matter of construction of the gift, limited to the income accruing during the period of his own life. Equally, there is no limitation as to the way in which he disposes of the income, either when he receives it or in advance. It follows that if true effect is to be given to my intention, as a matter of construction, A must have the right to command the corpus. But these considerations may not apply to a charity. As I have indicated, a charity can effectively enjoy income as such in perpetuity and will, in the natural course of things, apply it for a varying class of beneficiaries. It is clear that if a testator so desires, he can effectively impose trusts limiting the way in which the income is applied, for example, by saying that such income is to be applied for some special purpose of the charity, and effect will be given to such direction. I think it also clear (although those appearing for the charities were not prepared so to concede) that a testator can impose an effective trust of income in perpetuity for the general purposes of a charity, a view which is, in my judgment, supported by the authorities to which I shall refer.

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[1] (1798) 4 Ves. 50.

It was argued that an individual to whom an indefinite gift of income was made was entitled to corpus as a rule or matter of law, which took effect independently of and notwithstanding the wishes of the testator interpreted as a matter of construction. I do not accept this view. No doubt in some cases the wishes of a testator, which will be defined as a matter of construction, will be overridden if their result is inconsistent with some principle of law. Thus, a testator may direct in unmistakable terms an accumulation of income for 50 years: but the law will hold such provision ineffective. Similarly (and more to the present point), if a testator provides for perpetual trusts of income in a gift to a non-charitable institution, the gift will be void because of the rule against perpetuities. The books contain many examples of such cases and to some of them I shall presently refer. But no such question arises here. If, on the true construction of his will, the testator intended to give to each of the charities a share of income (and no more) in perpetuity, and if he further intended that the income given to each charity was to be applied for the general purposes of the charity, then, in my judgment, the question whether the charities can call for distribution of the corpus depends on the true interpretation of the scope and extent of the gift which the testator intended to confer. I repeat that, in my judgment, an indefinite gift of income to an individual requires that the individual be entitled to the corpus not by reason of some overriding rule of law, but because only by payment of the corpus can the individual get the full benefit and extent of the gift which, as a matter of interpretation, the testator intended. A similar conclusion does not, I think, follow in the case of an indefinite gift of income to a charity for its general purposes, and if the testator here intended his gifts to be of that character, I see no reason why his dispositions should not be effective.

It seems to me, therefore, that the first question which must be answered is: What did the testator intend? More specifically, did he here intend to impose perpetual trusts of the income of his trust estate for the general purposes of the six charities which he named?

I turn to the language of the will, and I note first that the corpus of the estate is not left to the general trustees of the will (Barclays Bank Ltd. after the deaths of his brothers and sister), but is to be paid over to the Official Trustee of Charity Funds to form a fund entitled "The Levy Family Charitable Trust." It was stated in evidence, and it is a legitimate matter to take into account, that the testator and his brothers and sister all made wills in similar form: so that, on the deaths of his brothers and sister, their estates also were paid to the Official Trustee of Charity Funds and form part of the "Levy Family Charitable "Trust." This circumstance is, I think, emphasised by the reference in clause 9 of the will to the fact that the testator and his brothers and sister had all their lives maintained their property "jointly in a state of community."

Obviously, therefore, it was a highly important feature of the testator's intended gift that the corpus of his estate should form part of this named family trust. It is not, I think, possible to doubt that he intended the trust to be perpetually maintained as a family memorial.

It is true that the testator did not state that the shares of income which he then proceeded to give were to be applied in each case for the general purposes of the named charity: but in the light of what had gone before I cannot doubt as a matter of intention that that is what he meant. I would, therefore, read the gifts to the six charities as if there followed in each case words to the effect "to be applied to the general purposes of the "institution."

Here, I think, some (though slight) support may be had from clause 15. True, the challenge or interference mentioned in the clause seems to be in regard to the administration by his trustees before the final trust took effect in favour of the Official Trustee of Charity Funds, so that, if the clause does not fairly contemplate a challenge at a later date, it cannot so far be prayed in aid of an intention to create perpetual trusts of income. On the other hand, I observe that if one of the charities by a challenge were to forfeit its interest, then the testator provided that "the "capital and income representing such interest" should go to the trustees for the King Edward's Hospital Fund. In such an event the testator made it clear that King Edward's Hospital Fund took the capital, and thereby seemed to show clearly a distinction between the nature of the contingent interest of that hospital fund and the interests of the six charities named in clause 11.

If, then, I have correctly construed the testator's will and discovered his intention, is there any good reason why effect should not be given to it? With all respect to the judge, I think there is not. I have said more than once that I do not accept the view that there is any rule of law which in such cases overrides intention, and I further do not think that an indefinite gift of income to a charity requires, in order to give effect to it as a matter of construction of the nature and extent of the gift, that the charity is entitled to call for the corpus.

I refer now to some of the cases. I have earlier mentioned *Philipps* v. *Chamberlaine*.[2] In that case, unless the donee of income took the corpus, the result would have been an intestacy, which Arden M.R. was naturally concerned to avoid. The language of the judgment included the following[3]: "I should "apprehend, that where the dividends and interest of the residue "are given absolutely to the trustee and his heirs, upon trust "to pay the interest and dividends to A from time to time without "any limitation of duration, it would carry the whole interest, "even without the aid of the subsequent parts of this clause "directing the shares to be paid at the age of 21, with benefit "of survivorship in case of the death of any of them before "that age; from which, I think, a fair inference arises. It is "impossible to suppose such an absurdity, as would result from "the contrary construction. An absurdity may be so great as to "raise a necessary implication. A judge must divest himself of "common sense to impute such an absurdity to a testator as to "suppose that he gives the interest to them for their respective "lives only, and that, if any one shall die under the age of 21, "then that share given for life only shall survive to the others; "and so, if more than one die under that age; but if any of them "should live to attain 21, in that case it should not go over to

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[2] 4 Ves. 50.

[3] Ibid. 58.

"the survivors, but be undisposed of. That part of the clause is "perfectly satisfactory to show, that he did intend to give them "the absolute interest." I emphasise the last sentence: "He "did intend to give them the absolute interest." The conclusion, in other words, is, to my mind, based not upon some prevalent rule of law, but upon the extent of the gift as properly interpreted.

In Fearne's Contingent Remainders, 10th ed. (1844), vol. 1, p. 465, it is stated: "Here we observe, that although only the "dividends and payments of the stock and annuities and use of "the furniture were devised for life to L. A. P. and not the "stock, annuities or furniture themselves expressly; yet it was "held to be the same thing: for as a devise of the rents and "profits of land is tantamount to a devise of the land itself; so "pari ratione, a devise of the dividends and payments of stock "and annuities, and of the use of furniture, seems equivalent to "a like limitation of the stock, annuities or furniture themselves; "for such dividends, payments or use, are the only immediate "produce or value of the stock, annuities or furniture." Note again, that the result is arrived at because the devise of the rents and profits is "tantamount to the devise of the land," and that a similar principle is applicable in the case of personalty. It is, as a matter of construction of the gift, the same thing.

In *In re Lawes-Wittewronge*[4] Warrington J. based his decision that the individual to whom an indefinite gift of income had been given was entitled to corpus for the "obvious" reason that it would be absurd to say that the income arising from the fund was for all time (and I emphasise those three words) to be paid to one person, while the corpus was to belong to someone else. True, he introduced the relevant passage in his judgment by the words[5]: "It is an undoubted rule of law," but he proceeded immediately to add the corrective "or rather perhaps "of construction."

Danckwerts J. regarded the case as covered by the two decisions of *In re Morgan*[6] in the Court of Appeal and *Wharton* v. *Masterman.*[7] The testator in *In re Morgan*[8] had directed his trustees out of the interest and rents of his estate to pay certain annuities—in some cases to a named person or his or her descendants: and to pay the residue of the interests and rents to named charities. Stirling J. held[9]—but we have not the benefit of any report of his reasons—that the annuitants were intended to take for life only, the reference to descendants being by way of substitution of living descendants for an annuitant predeceasing the testator: but that the charities were entitled to corpus. There was no appeal upon the second point, and upon the first point this court upheld Stirling J.'s conclusion. Lindley L.J. no doubt said [10] that he thought that the indications were that the testator did not intend anyone to have the corpus "not even the charitable "institutions." But the last words were in the circumstances pure dictum. The will may well have been construed, or capable of being construed, as not intending to impose any trusts upon the income given to the charities. I do not, therefore, think *In re Morgan* [11] assists the solution of the present case.

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[4] [1915] 1 Ch. 408.
[5] Ibid. 412.
[6] [1893] 3 Ch. 222.
[7] [1895] A.C. 186.
[8] [1893] 3 Ch. 222.
[9] Ibid. 224.

In *Wharton* v. *Masterman* [12] the testator had given certain annuities out of income, and subject thereto, he gave the residue of his estate to charities. Though the latter gift was expressed in unusual form, there was no doubt that it amounted to a gift of corpus; but enjoyment of corpus was, of course, postponed until the death of the last annuitant. The testator, however, further directed that during the lives of the annuitants the surplus income should be accumulated. The question was whether (since, as was held, the annuitants took no interest in the surplus income), the charities could stop the accumulations and receive surplus income until the death of the last annuitant; and the House of Lords, affirming the view of Stirling J. and the Court of Appeal, held that they could—seeing that subject to the interests in income of the annuitants, they were absolutely entitled to the property. The present question did not, therefore, arise at all. Counsel for the charities in the present case relied, however, on certain language of Lords Macnaghten and Davey. Lord Macnaghten, after saying that there could be no doubt if the residuary legatees were individuals that they could stop the accumulations, inquired whether it made any difference that the legatees were charities. He proceeded [13]: "The charities alone are interested "in the surplus income accruing from year to year. Their "interest is vested and indefeasible. And they may legally apply "what they take under the bequest either as capital or income." Having regard to the nature of the question before the House, the language of Lord Macnaghten cannot, in my judgment, be regarded as authority for the view as respects indefinite gifts of income to charitable institutions, that they stand in all circumstances in exactly the same position as individuals.

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[10] [1893] 3 Ch. 222, 227.

[11] [1893] 3 Ch. 222.

[12] [1895] A.C. 186.

[13] Ibid. 194.

The language of Lord Davey was as follows [14]: " And I think " it unsound to make the application of a canon of construction " as to the effect of particular words in a will dependent on " circumstances affecting the quality or character of the donee. " It will be observed that in the present case the gift is to each " charity in a form which would enable the managers to spend the " amount as income, or deal with it as they might think fit. We " have not to deal with a fund to be created by accumulations and " settled as a capital endowment at a future time, as to which " different considerations would arise." Again, the language must be interpreted in the context of the question before the House, though I observe the qualification in the last sentence quoted, and I observe, too, that Lord Davey treated the general question " as a canon of construction "—a view supporting that which I have ventured earlier to state.

If, then, I am right so far in thinking that the nature of the gifts to the charities depends upon the true construction of the will, and if the will should be construed as though it imposed on the gifts of income trusts for the general purposes of the respective charities, there only remains the question whether nonetheless, as a matter of interpretation of the gifts and their intended extent, the charities can call for the distribution of the corpus.

There are, as I have said, numerous and well-known instances in the books (from the first Penzance library case, *Carne* v. *Long*,[15] onwards) of gifts of income in favour of non-charitable bodies which have been held void as offending against the perpetuity rule. In *In re Clark's Trust* [16] Hall V.-C. held invalid on that ground a gift " to apply the dividends and income " of a sum of money in aid of the funds of a friendly society. It is true that the named friendly society, having been dissolved, no claim was made on its behalf or on behalf of its members to entitlement to the corpus; but Hall V.-C.'s decision has been since quoted and followed many times as a matter of principle. It was, for instance, so quoted and approved in the Corps of Commissionaires' case of *In re Clarke*,[17] by Byrne J. In that case the gift was a gift of a share in certain property (not, be it observed, of the income of the property) in favour of the committee for the time being of the corps to aid in the purchase of their barracks

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[14] [1895] A.C. 186, 200.

[15] (1860) 2 De G.F. & J. 75.

[16] (1875) L.R. 1 Ch. 497.

[17] [1901] 2 Ch. 110; 17 T.L.R. 479.

"or in any other way beneficial to that corps." Byrne J. held that the gift, in so far as any of its objects were not charitable, was a good gift, since upon its true interpretation the committee could apply at once the whole capital sum for any purpose of their institution, so that no question of perpetuity arose. "When "once it" (i.e., the capital sum) "forms part of the funds of the "corps, it may be dealt with by the governing body . . . in any "way they may think best for the benefit of the corps."[18]

On the other hand, in *In re Macaulay's Estate*,[19] the House of Lords held that a gift of the testatrix's residuary estate to a lodge of the Theosophical Society "absolutely for the mainten-"ance and improvement" of the lodge was bad as involving an indefinite trust of income in favour of a non-charitable institution and, therefore, offensive to the perpetuity rule. Lord Atkin and Lord Tomlin construed the words I have quoted as intended to create an endowment to secure the continuance of the lodge, i.e. (as I understand), as impressing the income of the residuary estate with a perpetual trust for the general purposes of the lodge.

I cite last the later Penzance library case of *In re Swain*[20] before Joyce J. The testator in that case had given the income of his residuary estate on certain trusts in favour of the chess club at Penzance, and subject thereto he gave "the same income to "the Penzance library." The trusts in favour of the chess club having been held void, the question then arose as to the gift over of the income in favour of the Penzance library. Mr. C. J. W. Farwell, for the library, argued that, according to the terms of the gift, the library committee could call for the corpus of the property and dispose of it as they thought fit; so that no question of perpetuity arose. But Joyce J. rejected the argument. "In "the present case," he said,[21] "all that is expressed in the will "is a gift of income out of the estate to this society. Now, a "definite gift[22] of income ordinarily amounts to a gift of the "corpus or capital, but that is only so where there is no intention "express or implied that the donee is not to take more. In the "present case, looking at the circumstances and reading the "whole will, I am of opinion, on the terms of the will itself, that "nothing more was intended to be given to this society than the "annual rents, dividends, and profits. Therefore, in my "opinion, that is a perpetuity or tends to perpetuity on the face "of it, and the gift is void."

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[18] [1901] 2 Ch. 110, 121.

[19] [1943] Ch. 435n.

[20] (1908) 99 L.T. 604.

[21] Ibid. 606.

[22] "Indefinite gift," see *per* Harman L.J., post, p. 367.

All the cases which I have recited relate to gifts in favour of non-charitable institutions. But they establish, in my judgment, that if the true construction of the gift is inconsistent with an intention that the institution can call for capital, then the gift is avoided by the perpetuity rule and cannot be saved on the broad ground that an indefinite gift of income entitles the donee to call for the corpus and put an end to the trusts of income. It is true that no corresponding case has been cited to us relating to a gift in favour of a charitable institution—no doubt for the obvious reason that in such a case no question of invalidity could arise. But is there any ground for supposing that any different principle of construction could apply in the case of a gift of income in favour of a charitable institution? I think not. If upon the true interpretation of the gift a testator intends to create in favour of a charitable institution a perpetual trust of income, for example, by stating that the income is to be applied for ever for the general purposes of the institution (in terms which, if the donee were non-charitable, would cause the gift to fail as offending against the perpetuity rule), is there any ground for saying that the charitable institution can determine the trusts and call for the corpus of the property (as the non-charitable institution, in order to save the validity of the gift, could not do)? I think there is not. In other words, I think there is no " canon " of construction " (to use Lord Davey's phrase) which in such a case says that the intended extent of the gift entitles the charitable donee, if it is to enjoy that which is given as was intended, to call for corpus, and no authority which would support or justify such a conclusion.

I, therefore, think that (subject to the special point raised in its own case by the London Hospital) the court should give effect to the testator's intention as I have interpreted it. As regards the London Hospital, it is no doubt true that, being a corporation incorporated by Royal Charter, it has (according to the terms of the charter) the same capacity to do with its own as an individual. It may, therefore, not be subject to the same control as its co-defendant charities in regard to the application in fact of its property. But the corporation carries on the hospital activities known by its name, and, in my view, the gift of income to the London Hospital should be treated as having impressed upon it (in the same way as the gifts in favour of the other institutions) the qualification " for the general purposes of the hospital." I can see no ground, accordingly, for interpreting the gift in favour of the London Hospital differently from the gifts in favour of the other charitable institutions, or for saying that the London Hospital has, according to the terms of the gift in its favour, any right quoad corpus which the other charities have not.

In the circumstances I think that Mr. Buckley has made good his argument for allowing the appeal, and that an order should be made, accordingly, in the terms prayed by the notice of appeal.

SELLERS L.J. The testator intended, as I would read his will, that the whole of the capital of his residuary estate should be kept perpetually intact in the hands of the Official Trustee of Charity Funds to form "The Levy Family Charitable Trust" as a memorial to a family which had conserved money and nurtured charity, and that the proceeds should be enjoyed with equality of income in each eighth share year by year.

All the named charities would be known to be, or would have been assumed by the testator to be, of a permanent character, who as far as could be envisaged, would use year by year for their respective purposes such income as they could command. The nature of these institutions is not similar but is in contrast to that of an individual whose life must end, and who cannot enjoy an income beyond a limited span of years, and from this point of view I would not differentiate the London Hospital.

The beneficiaries, except the two charities for whom Mr. Warren appeared, have not been content with what they were given in the way the testator intended to give it. No doubt in the belief that they could obtain greater benefit for their respective charities by having the capital in their own hands than in the hands of the appointed trustee, they have risked these proceedings. It seems the risk was not great, for clause 15 has been ignored by the judge and there is no appeal against the decision.

I am inclined to think that the testator, far from intending to give the claimants a share of the capital of his residuary estate, intended to disinherit them and to benefit in their place, with the relative capital and interest, the King Edward's Hospital Fund, who, by wise anticipation, were his chosen alternative to those of his original beneficiaries who did not want his benefactions without disputing the manner or the extent of the giving.

If this is heresy to those who breathe the air of Chancery, it is to me, who have not breathed that air so long, a comment which has remained after all the argument and consideration this case has received. According to the testator, if any institution was to have the capital, it was the King Edward's Hospital Fund.

It has been established that an indefinite gift of income to an individual (immediately or after a period of accumulation) would entitle the individual to the capital or fund from which the income was to be derived. I agree with the opinion of Lord Evershed M.R. that this is so not by some overriding rule of law but because only by a payment of the capital could the individual get the full benefit of the gift which, as a matter of interpretation, the testator intended. A similar conclusion does not seem to me to follow in the case of an indefinite gift of income to a charity for its general purposes.

The authorities reviewed by Lord Evershed M.R. do not require, and no reason, social, practical or economic requires, the court in my opinion to allow the parties in this case to enjoy the benefactions of the testator while discarding the terms on which the benefactions were made.

I agree with the judgments of Lord Evershed M.R. and Harman L.J., and with deference to the experienced views of Danckwerts J., I, too, would allow the appeal.

HARMAN L.J. These proceedings are, on the face of them, concerned only with the affairs of one George Levy, who died in the year 1940, but are in fact likely to control not only his estate, but that of his two brothers, Abraham who died in 1943 and Maurice who died in 1955, and his sister Bertha, who died in the year 1954. The three brothers carried on for many years business together as retailers of footwear and clothing in the Midlands, and they and their sister Bertha appear to have maintained the whole of their properties in common. All four of them left wills in terms which, for the present purposes, may be taken to have been identical, and the present question arose upon the death of the last of them, Maurice, in October, 1955. The Bank is executor and trustee of all the wills. The combined residue of the three brothers falls not far short of a quarter of a million pounds; the sister also left a large estate, and all four funds devolve in the same way.

The testator's will was made on August 12, 1936. His estate has been fully administered. The relevant parts of the will are in clause 11, which has already been read and I shall not read it again. By clause 15 the testator sought to forfeit the share of any charity challenging or calling in question the terms of his will and purported to give over the forfeited share or shares to the King Edward's Hospital Fund. This clause, however, was declared by the judge to be void and on that point there is no appeal.

The only other question before the judge arose out of the claim of some of the charities to have handed over to them absolutely for their several charitable purposes the share of corpus referable to the income bequeathed to them. The judge accepted this claim, holding in effect that the result of an indefinite gift of income by will in favour of a charity has the same effect as a like gift in favour of an individual, to wit, that the legatee may claim to have paid to him that share of capital to which the income given is referable. The contention of the Attorney-General is that this so-called rule is merely a rule of construction or, in other words, a guide to the construction of a will. Where the instrument makes no disposition expressly disposing beneficially of the corpus of a fund or share of which the income is given, but leaves the testator's further intention as to its disposition entirely as a matter of inference, it has long been held that the court may, and as a rule should, construe the gift of income with no temporal limit attached if it be to an individual as equivalent to a gift of the capital producing that income. But the appellant argues that this is only an inference to be drawn where no contrary intention appears in the instrument, and that in the present case it is perfectly clear that this was not the testator's intention. Nonetheless it is argued by the legatees that there is a well-settled rule in the case of a gift to individuals and no reason why charities, whether corporate or incorporate, should be treated differently.

The rule is an old one going back at least to the time of Arden M.R., who so held in *Philipps* v. *Chamberlaine*,[23] where the headnote reads: "The capital of the residue passed by implication; "though the interest and dividends only were expressly disposed "of." An explanation is afforded by Warrington J. in *In re Lawes-Wittewronge*[24] in the words which have already been read.

The question is whether this principle applies to charities of which here there are three kinds, namely, unincorporated associations consisting of individuals holding charitable funds upon specific charitable trusts, secondly, corporations under the Companies Acts whose objects are defined by their memoranda of association, and, thirdly, a corporation by charter, which of course can do anything which a natural person can do except in so far as the terms of the charter forbid it. Each of these three classes of charity, of course, holds its endowments upon trusts to which the law allows an indefinite duration because they are charitable, and moneys given to them are devoted to their several charitable purposes whether the gift makes any mention of those purposes or no. It must, as it seems to me, be possible by proper words to add to those endowments and so create a trust of indefinite duration. Were it not so there would have been a short end to cases where the argument turned on whether the donee was intended to have the spending of the capital or no. A good instance is *In re Swain*,[25] a case concerning a library at Penzance, from which the passage has already been cited by Lord Evershed M.R., but as to which I would observe that the judge is misreported because the words used are [26] "a definite gift of income" whereas clearly Joyce J. meant to say "an indefinite gift of "income" and the reporter misunderstood him or misheard him. There was an earlier case about a gift to this same library, *Carne* v. *Long*.[27] In that case the gift was of corpus in terms that might have been construed as an absolute gift to the members, but Lord Campbell L.C. looked at the constitution of the body and concluded that the donees could not under the rules dispose of the capital: he, therefore, held that this gift too tended to a perpetuity and was void. This case is authority for the proposition that a gift to a public body is a gift to it for its work or purposes.

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[23] 4 Ves. 50.

[24] [1915] 1 Ch. 408, 412.

Similarly in *In re Clark's Trust*,[28] where Hall V.-C. comes to the conclusion that a gift of income to a friendly society, not being a gift to a charity, was void as tending to a perpetuity. See also *In re Amos*,[29] a case of a gift to a trade union.

The judge appears to have considered that the case was covered by *Wharton* v. *Masterman*.[30] In my judgment that case is irrelevant. There was no doubt there that the gift to the charity was a gift of capital absolutely. What the testator wished to do was to defer the handing over of the capital for a period while the income accumulated, but it was held that a charity, no less than an individual, being absolutely entitled to corpus, may stop the accumulations and call for the corpus at once. This does not seem to me to govern a case where, on the face of the will, only income is given.

I do not find any reason to differentiate between the legatees according to their constitutions. It is quite clear that the testator intended them all to be treated alike. To each income is given

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[25] 99 L.T. 604.
[26] Ibid. 606.
[27] 2 De G.F. & J. 75.
[28] L.R. 1 Ch. 497.
[29] [1891] 3 Ch. 159; 7 T.L.R. 559.
[30] [1895] A.C. 186.

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which must, as a matter of construction, be treated as given for the purposes of the work carried on by each, and I cannot see that a difference in the constitution of the donee can make any difference to the quantum of the gift.

I concur in allowing this appeal.

Appeal allowed. Appellant's costs as between solicitor and client out of the estate. Executors' costs, charges and expenses out of the estate. One set of costs as between solicitor and client out of the estate to be shared among the respondent charities. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; White & Leonard; Stephenson, Harwood & Tatham; Birkbeck, Julius, Coburn & Broad; Hanbury, Whitting & Ingle and Pennington & Son; Hyman Isaacs, Lewis & Mills; E. F. Turner & Sons.*

E. D.

1960
Feb. 9, 10.

Cross J.

TAYLOR *v.* ELLIS AND ANOTHER.

[1959 T. No. 1004.]

Mortgage—Leasing, power of—Express provision—Statutory power of leasing excluded except with written consent of mortgagee—Grant of tenancy—No evidence of consent—Onus of proof of consent—Knowledge of lease by mortgagee—Non-payment of mortgage interest—Whether lease binding on mortgagee.

A mortgage dated October 27, 1924, excluded the mortgagor's statutory power of leasing unless the mortgagee should consent in writing to the lease. By an agreement dated September 19, 1940, the surviving mortgagor purported to grant a monthly tenancy to W. H. The surviving mortgagor, who granted the tenancy, died on July 11, 1943, and the original mortgagee died on July 21, 1957. There was no evidence that the mortgagee did give written consent to the grant of the tenancy, but there was no positive evidence that he did not, and it was possible that he had:

[Reported by Miss V. A. MOXON, Barrister-at-Law.]

it was admitted that the mortgagee knew of the tenancy. No mortgage interest was paid after October, 1950, and, on August 5, 1959, the mortgagee's personal representative issued an originating summons claiming possession of the property subject to the mortgage:—

Held, (1) that the onus was on the tenant to prove that the mortgagee gave written consent to the grant of the tenancy and, therefore, in the absence of any evidence of such consent, the tenancy was not, to begin with, binding on the mortgagee.

(2) That the tenancy had not become binding on the mortgagee by reason of the events subsequent to the grant of the tenancy, for it would be wrong to infer merely from the facts that the mortgagee, having knowledge of the tenancy, allowed the tenant to remain in possession, and that no interest had been paid for nine years, that the mortgagee had consented to take the tenant as his tenant. The plaintiff, accordingly, was entitled to possession against the tenant.

In re O'Rourke's Estate (1889) 23 L.R.Ir. 497 applied.

Hepworth v. *Pickles* [1900] 1 Ch. 108 distinguished.

ORIGINATING SUMMONS.

By a mortgage dated October 27, 1924, William John Ellis and Albert Edward Ellis, the legal personal representatives of William Ellis, deceased, granted a mortgage on a property known as "Killarney," at Etchingham, Sussex, to Thomas Taylor, to secure the repayment of a sum of £250 with interest. The mortgage provided, inter alia, that it was expressly agreed and declared that no lease made by the borrowers of any of the property or any part thereof during the continuance of the security should have effect by force or virtue of the Conveyancing and Law of Property Act, 1881, unless the lender should consent thereto in writing.

On April 15, 1936, William John Ellis died. On September 19, 1940, Albert Edward Ellis, the surviving mortgagor, granted a tenancy of the whole of the property to William Thomas Hayler who, since about 1928, had been in possession of part of the property as a subtenant of Barclays Bank Ltd., it appearing that Barclays Bank Ltd. held the whole of the property under a lease which came to an end in 1940. The tenancy was determinable by a month's notice on either side; and there was nothing in its terms to prevent it from being an exercise of the statutory power of leasing.

On July 11, 1943, Albert Edward Ellis died. His legal personal representatives were Edith Miriam Jeffery and Lionel Charles Ellis. Edith Miriam Jeffery died on June 6, 1947, leaving Lionel Charles Ellis the legal personal representative by representation of the surviving mortgagor.

No interest under the mortgage was paid to the mortgagee after October 5, 1950. On July 21, 1957, the mortgagee died and on August 5, 1959, the plaintiff, his legal personal representative, issued an originating summons against Lionel Charles Ellis, as the person entitled to redeem the mortgage, and the tenant, as the person in possession of the property, claiming possession of the property.

N. C. H. Browne-Wilkinson for the plaintiff mortgagee. The burden of proving that the mortgagee gave his consent lies on the mortgagor. A mortgagee of land is, as against the mortgagor and anyone deriving title from him, entitled to possession of the land. When the mortgagee has proved the mortgage and the fact that he is the mortgagee, he is, prima facie, entitled to possession. If the tenant is to have a better title than the mortgagee, he must prove that he has a lease granted under the mortgagor's statutory power of leasing, for a lease granted under the mortgagor's common law power will not prevail against the mortgagee. The fact of the tenancy raises no presumption that it was a tenancy granted pursuant to the statutory power because it might equally be a common law tenancy. The effect of a clause requiring the mortgagee's consent in writing to any lease which is to bind him is to make such consent a further condition to the exercise of the statutory power of leasing: *Iron Trades Employers Insurance Association Ltd.* v. *Union Land and House Investors Ltd.*[1]

To require the mortgagee to prove that he did not consent to the granting of the lease is to ask him to prove a negative proposition, and the court leans against putting such a burden on any party to litigation: *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[2] Where a consent in writing is required, it is for the person who wishes to rely on it to prove its existence, especially where, as in the present case, both parties to the mortgage are dead. If there was a consent in writing, one would have expected it to have been produced. A member of the firm of solicitors which acted for both mortgagee and mortgagor at the relevant time has said in an affidavit that no consent can be found. That is some evidence that no consent was given.

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[1] [1937] Ch. 313, 322; 53 T.L.R. 341; [1937] 1 All E.R. 481.

[2] [1942] A.C. 154, 161, 177, 194, 202; 57 T.L.R. 485; [1941] 2 All E.R. 165 (H.L.).

Bryan Clauson for the tenant. It is for the mortgagee, the plaintiff, to prove his case. It is sufficient for the tenant, by way of defence to an action for possession, to say that he is a tenant of the property, and then it is for the mortgagee to satisfy the court that the tenancy is not binding on him. It is very unusual for a plaintiff not to have to prove his case. In the *Joseph Constantine* case[3] it was suggested that the defendant should be required to prove a negative, whereas in the present case it is the plaintiff who, it is suggested, ought to have to prove the negative proposition that the tenancy is not binding on him, for it is part of the case he has to establish to succeed in his claim for possession. The difficulty in this case is caused by the fact that the mortgagee is dead. If he were alive, there would be nothing simpler than for him to give evidence that he never consented to the tenancy. On that hypothesis, it is absurd to suggest that it would be a great burden on the mortgagee for him to have to establish that he had not consented. It would be difficult for the tenant to prove that the consent had been given, for it would not be in his possession.

On the second question—whether, assuming no consent was given, the mortgagee subsequently became bound by the lease—it is conceded that, if the mortgagee had delayed for only six months after becoming aware of the tenancy before taking proceedings, he would not have become bound by the lease by reason of so short a delay. Where, however, the tenancy has, with the knowledge of the mortgagee, subsisted for 19 years, he must be taken to have waived the provision in the mortgage that a lease to which he does not consent in writing will not be binding on him. Where something has lasted for a long time, a licence to do it will be presumed: *Hepworth* v. *Pickles*.[4] That was a case of a restrictive covenant, but there is, in principle, no distinction between a restrictive covenant and an agreement not to lease without consent.

Parker v. *Braithwaite*[5] is against the tenant here except for some remarks made by Danckwerts J. at the end of his judgment[6]; in that case[7] the delay was for only eight months. In *Bradford Permanent Building Society* v. *Cholmondeley*,[8] referred to in *Parker* v. *Braithwaite*,[9] the delay was for a year or 18 months. Farwell J. in the *Iron Trades* case [10] and Danckwerts J. in *Parker* v. *Braithwaite* [11] both said that there might be cases in which delay would amount to a waiver. The facts in the present case are circumstances in which delay would amount to a waiver. In *In re O'Rourke's Estate*,[12] which was an Irish case, Monroe J. held [13] that delay would not of itself amount to a waiver, for there was no need for the mortgagee to do anything while the mortgage interest was being paid. Here, not only was there a delay of 19 years, but for the last nine years no interest was paid under the mortgage.

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[3] [1942] A.C. 154.

[4] [1900] 1 Ch. 108.

[5] [1952] 2 T.L.R. 731; [1952] 2 All E.R. 837.

[6] [1952] 2 T.L.R. 731, 736.

[7] [1952] 2 T.L.R. 731.

[8] Unreported, May 26, 1952, Harman J.

[9] [1952] 2 T.L.R. 731, 736.

Browne-Wilkinson on the second question. Unless the mortgagee accepts the tenant of the mortgagor as his own tenant he is not bound by the tenancy. It is not a question of delay or waiver, but whether the mortgagee has taken the person in possession as his tenant: Coote on Mortgages, 9th ed., vol. I, p. 700; Wurtzburg on Building Societies, 11th ed., pp. 125–126. The only case on the point is *In re O'Rourke's Estate*.[14] The basis of the judgment of Monroe J.[15] was that the tenant must show a new tenancy between himself and the mortgagee and that mere standing by on the part of the mortgagee is no evidence of a new tenancy. Mere length of time can make no difference. If the mortgagee chose to allow the mortgagor to have this man as his (the mortgagor's) tenant, that could not make any difference to the position between the mortgagee and the tenant. The mortgagee can still, if and when he wishes, treat the tenant as a trespasser vis-à-vis himself. It is certainly odd that the mortgagee did not take any steps when the mortgage interest ceased to be paid; but that cannot affect the tenant's position.

The law will, prima facie, assume that the occupation of property is lawful (*Hepworth* v. *Pickles* [16]); but it is not said that the tenant's occupation is unlawful. The mortgagor has power at common law to let the property, and that power is not affected by the provision in the mortgage which merely prevents the statutory power of leasing from being exercised without the written consent of the mortgagee. There is no reason, in the present case, to suppose that the tenancy was not created under the common law power of leasing. The mortgagee could not have restrained the grant of the tenancy. All he could do, if he wished to prevent the tenant from being in possession, was to evict him and take possession himself; but a mortgagee is never under any obligation to take possession. There is no case in which mere failure to evict the tenant has been held to make him the tenant of the mortgagee. The basis of the presumption referred to in *Hepworth* v. *Pickles* [16] is that the usage is wholly inconsistent with the covenant. That is not so in this case. The occupation is quite consistent with the terms of the mortgage, and, therefore, there is no need for waiver to make it lawful. *Hepworth* v. *Pickles*,[16] therefore, does not apply. In any event that case is distinguishable from the present case, for it related to a restrictive covenant, which is quite different from an agreement that no lease shall bind the mortgagee unless he consents thereto.

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[10] [1937] Ch. 313, 319.

[11] [1952] 2 T.L.R. 731, 736.

[12] (1889) 23 L.R.Ir. 497.

[13] Ibid. 501.

[14] 23 L.R.Ir. 497.

[15] Ibid.

[16] [1900] 1 Ch. 108.

The first defendant, Lionel Charles Ellis, did not appear and was not represented.

CROSS J. On October 27, 1924, the legal personal representatives of one William Ellis, who were, as such, the owners of a house known as " Killarney " at Etchingham in Sussex, granted a mortgage on that property to Thomas Taylor to secure the repayment of a sum of £250 with interest. Of course, at that date, the mortgage took effect as a conveyance of the fee simple of the property, and there was only an equitable interest left in the mortgagors. By the operation of the Law of Property Act, 1925, from January 1, 1926, the interest of the mortgagee was converted into a long term of years with an ultimate reversion in the mortgagors, but it is common ground between the parties that nothing in this case turns on that change.

There is only one provision of the mortgage which it is important to bear in mind, and that is, that it was expressly agreed and declared by and between the parties that no lease made of the property or any part of it by the borrowers during the continuance of the security " shall have effect by force or " virtue of section 18 of the Conveyancing and Law of Property " Act, 1881," which is now replaced by section 99 of the Law of Property Act, 1925—" unless the lender shall consent thereto in " writing."

[His Lordship stated the facts and continued:] The first point which arises is whether or not the grant of the tenancy was an exercise of the statutory power of leasing; whether or not, that is to say, the mortgagee gave his consent to it in writing. Normally, in cases of this sort there is not the least difficulty in saying whether or not the consent in writing was given, because normally the mortgagee is alive, and can say whether or not he consented; and, again, when the mortgagee is a company, such as a building society, the difficulty can hardly arise. The difficulty which has arisen in this case is that both the mortgagee and the mortgagor who created the tenancy are dead.

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[16] [1900] 1 Ch. 108.

The way the matter stood on the affidavit evidence was that a Mr. Serres, an assistant solicitor with a firm of solicitors, Andrews and Bennett, who are acting for the plaintiff in these proceedings, said in his affidavit that neither the mortgagee nor any person on his behalf ever gave his consent to the grant of such a tenancy. It has emerged, and it is common ground between the parties, that there really is no positive evidence that the mortgagee never consented in writing to the tenancy as, for example, there would have been had the deceased mortgagor told Mr. Serres that he had never asked for or taken any consent from the mortgagee. Had that been proved, there would have been positive evidence that there was no consent. The matter simply rests in this way, that the firm of Andrews and Bennett were acting in 1940, when the tenancy was granted, both for the mortgagee and for the mortgagor, and that there is no record in the firm's papers of any written consent by the mortgagee to the creation of the tenancy. As I said, there is no positive evidence that he did not give his consent and it remains possible that he may have done so.

On those facts the point that has been argued is on whom does the onus lie to establish that the mortgagee either gave or did not give his consent in writing.

I think the matter can best be decided by asking how the point would be pleaded in an action of ejectment. It seems to me that the mortgagee in his statement of claim against anybody in possession of the land would have to do no more than set out the mortgage, which showed that he had the immediate legal estate, and claim possession. It would not be necessary for him to allege that the defendant claimed to be in possession as a tenant, but that the tenancy was not binding on him: it would be sufficient for him to say that he had the legal estate as mortgagee, and that he claimed possession. I did not understand Mr. Clauson really to dispute that.

Then there comes the question of defence. Mr. Clauson suggests that it would be sufficient for the defendant to set up the tenancy by way of defence without asserting that the mortgagee had consented in writing to its creation, and that that would raise (as it were) a prima facie case on his side which would force the plaintiff by way of reply to make a negative allegation that the mortgagee had never consented in writing to granting a tenancy. If that is the case, of course, the plaintiff in his case would not be able to establish that proposition.

In my judgment, that is not the right way of looking at the matter. I think that it can be tested in this way: suppose there had been, as there might well have been, in the mortgage deed an absolute prohibition on the granting of any leases. Had that been so, it is always possible that the mortgagee might have so conducted himself as not to be able to rely on that absolute prohibition. He might, notwithstanding the prohibition, have waived his rights or consented in some way to the lease. But if a tenant were going to allege that in the face of an absolute prohibition, he would have to set it out in his defence. It seems to me that in the same way here, where the provision in the mortgage is that a lease will only be binding on the mortgagee if he consents thereto in writing the defendant would have to show that there had been a consent in writing. It is an additional argument in favour of that way of looking at the matter that the courts lean somewhat against imposing on any party to litigation the burden of proving a negative. That appears from various obiter dicta in *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[1] I would refer particularly to the dictum of Lord Russell of Killowen[2]: "In coming to this con-"clusion I am influenced by three considerations. First, the "proving of a negative, a task always difficult and often impossible, "would be a most exceptional burden to impose on a litigant."

In my judgment, therefore, on the first point, the plaintiff is right, and in the absence of any evidence that the mortgagee did consent in writing—and, indeed, the evidence as far as it goes strongly suggests that he did not, because if he had consented in writing one would have expected the document to be available—I think that it must be taken that to begin with this tenancy was not binding on the plaintiff.

Then the question arises: did the mortgagee become bound by the tenancy by reason of subsequent events? It is, of course, quite common for a mortgagee who is not previously bound by a tenancy to consent to take the mortgagor's tenant, whom he could have treated as a trespasser, as his own tenant. The commonest way in which that happens is when a mortgagor fails to pay the mortgage interest and the mortgagee serves a notice on the tenant to pay the rent to him. Then a new tenancy is created between the mortgagee and the mortgagor's tenant. But all that happened in this case was that for a great many years the tenant was allowed to remain in occupation of the property, and then there is the very curious circumstance that from October 5, 1950, onwards no mortgage interest was paid.

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[1] [1942] A.C. 154, 177, 194, 202; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[2] [1942] A.C. 154, 177.

Apart from that second point, it does not seem to me that the fact that the tenant of the mortgagor, who could have been treated by the mortgagee as a trespasser, was allowed to remain in possession for a long period could itself in any way preclude the mortgagee from treating him as a trespasser if and when he desired to do so. After all, as long as the mortgage interest is being paid, the mortgagee may perfectly well be content to allow the tenant to remain in possession. The only way in which he can turn him out of possession is by going into possession himself, which is a thing a mortgagee is generally very unwilling to do. I think that it would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy—there is no doubt in this case, and it is accepted, that Thomas Taylor knew of the tenancy—that the mortgagee consented to take the tenant as his tenant.

In that connection I entirely agree with the passage in the judgment of Monroe J. in *In re O'Rourke's Estate*,[3] quoted by Danckwerts J. in *Parker* v. *Braithwaite*.[4] Monroe J. said[5]: "I certainly cannot infer the creation of a new tenancy "between the tenant and the mortgagee merely because the "mortgagee takes no active steps to disavow a tenancy created "by the mortgagor. The mortgagor, while in possession, and "bound to keep down the interest on his mortgage, is at liberty "to manage the lands as he pleases. It is not for the mortgagee "to interfere with that management unless he choose to go into "possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it "afterwards for his interest to repudiate it."

On this part of the case Mr. Clauson referred me to *Hepworth* v. *Pickles*,[6] which turned on the question of waiver of a right to enforce restrictive covenants. The facts are set out in the headnote[7]: "By a conveyance dated in 1874, a certain plot of land "was conveyed subject to a covenant that no dwelling-house,

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[3] (1889) 23 L.R.Ir. 497, 501.

[4] [1952] 2 T.L.R. 731, 735; [1952] 2 All E.R. 837.

[5] 23 L.R.Ir. 497, 501.

[6] [1900] 1 Ch. 108.

[7] Ibid.

" shop, or other building to be erected on the land should at any " time thereafter be used as an inn, tavern, or beerhouse. " Shortly after the date of the conveyance beer and spirits were " sold in one of the houses erected on the land, and continued " to be openly sold for upwards of twenty-four years." It was held that by reason of his knowledge of that course of dealing the person entitled to enforce the restrictive covenant had waived or released his rights.

That case does not seem to me to have any relation at all to a case of this sort. There is not here a covenant by the mortgagor that he will not part with possession of the mortgaged premises, or purport to create any tenancy binding between himself and the tenant. There is no covenant which the mortgagee can enforce; his only way of protecting himself or preventing the creation of a tenancy binding as between the mortgagor and the tenant is to go into possession himself. As I have said, I do not think you can for one moment infer from the fact he does not go into possession that he is in any way waiving his right to treat the tenant as a trespasser.

Then one comes to what is certainly a very curious feature of this case, namely, the fact that from October, 1950, onwards no interest has been paid under the mortgage. Of course it is when interest ceases to be paid under the mortgage that one looks with an expectant eye to see if there has not been some recognition by the mortgagee of the mortgagor's tenant as his tenant, because you would expect him then to serve a notice saying: "I " want the rents." But there is absolutely no evidence here that anything happened at all. Thomas Taylor was apparently content to go without his interest until he died in 1957, and his executrix has gone without the interest down to the issue of this summons. If they had gone on going without the interest for 12 years they would have lost all rights altogether; but only nine years have elapsed. I do not think that I can infer, simply from the fact that no interest was paid, anything against the original mortgagee or the plaintiff as his executrix. It does not seem to me to carry the matter any further. It is a curious circumstance but again I do not think anything can be made of it.

So, in my judgment, the plaintiff is right on the second point also. The result is that the plaintiff is entitled to an order for possession.

Order accordingly. No order as to costs.

Solicitors: *Gouldens for Andrews & Bennett, Burwash; Spenser Limbrey & Co.*

1959
April 29;
May 7.

Wynn-Parry J.

C. A.

1959
Dec. 7, 8, 15.

Lord Evershed M.R.,
Romer and Sellers L.JJ.

In re APEX FILM DISTRIBUTORS LTD.

[No. 00179 of 1954.]

Company—Winding up—Contributories—Call on contributories—Liability of past members—Whether call effective—Date for fixing liability—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 212, 214—*Company Winding Up Rules*, 1949 (*S.I.* 1949, *No.* 330), *r.* 88.

In the compulsory winding up of a company the liquidator made a call on the present member of the company, the “A” contributor, and at the same time notified those members who had transferred their shares within the year preceding the winding up (the “B” contributors) that if the call was partially or wholly unproductive a call would be made on them. Nothing was received from the A contributor and the liquidator, being then satisfied that he was unable to contribute anything, wrote to the B contributors. After receipt of that notification, the B contributors purchased certain debts of the company which were owing before they had transferred their shares.

On appeal from a decision by Wynn-Parry J. that their liability had not been reduced by the amount of the debts thus purchased, because on the true construction of section 214 of the Companies Act, 1948, the debt of the contributories became payable on call and could only be extinguished by payment, it was conceded (contrary to the decision of the trial judge) that the later notification was not an effective call on the B contributors, but it was submitted that the first call (on the A contributor) was effective as against the B contributors:—

Held, (1) that, although the first call was valid as regards the A contributor, it was not an effective call on the B contributors, first, because at that date they were not under any liability to contribute; and, secondly, because the notification warning them that a call on them would be made if necessary negatived any intention by the liquidator then to make a call on them.

(2) That, accordingly, the extinguishment of the debts operated to reduce the liability of the B contributors, as there had been no call on them.

In re Blakely Ordnance Co., Brett's Case (*No. 2*) (1873) L.R 8 Ch. 800 followed.

Quaere whether the liability of the B contributories is fixed at the date of call or at a later date.

In re Greening, Marsh's Case (1871) L.R. 13 Eq. 388; and *In re City of London Insurance Co. Ltd.* [1932] 1 Ch. 226; 48 T.L.R. 169 considered.

Decision of Wynn-Parry J. reversed (on a different ground) [1959] 3 W.L.R. 8; [1959] 2 All E.R. 479.

MOTION.

By an order dated March 23, 1954, Apex Film Distributors Ltd., hereinafter called “the company,” was ordered to be wound up compulsorily on a petition presented on February 26, 1954. At all material times the issued capital of the company consisted of 42,000 7½ per cent. redeemable preference shares of £1 each, on which 10s. per share had been paid; 42,000 10 per cent. preferred ordinary shares of 5s. each on which 2s. 6d. per share had been paid; and 150 deferred shares of £1 each, all of which were fully paid up.

On July 23, 1953, the holders of 41,600 of the redeemable preference shares and 41,600 of the preferred ordinary shares transferred their respective holdings of these shares to one Arnold Williams, who held the balance of each class of share. At the commencement of the winding up Williams, therefore, was the only A contributory, the B contributories being the transferors of the shares transferred on July 23, 1953, as above mentioned.

On December 14, 1955, the committee of inspection resolved that a call of 10s. per share on the redeemable preference shares and a call of 2s. 6d. per share on the preferred ordinary shares should be made by the liquidator on all the contributories of the company. On December 20, 1955, the liquidator duly made the call in accordance with rule 88 of the Winding Up Rules,[1] and within the ambit of the requisite form 53 which was filed as required by the rule. By a letter dated the same day he gave notice to Williams to pay in respect of the call £26,250 on or before January 3, 1956, with interest at 4 per cent. as from that date until payment. The next day he wrote as follows to each of the B contributories, enclosing a copy of the resolution of the committee of inspection: " As you are aware, you were included " in the list as a ' B ' contributory in respect of (blank) . . . " redeemable preference shares, (blank) . . . preferred ordinary " shares, the calls on which total £(blank). A formal claim for " the amount of the total call on all the issued shares, of both " classes, has been made against the ' A ' contributory demanding " payment by January 3, 1956, but in the event of non-payment " or only part-payment by him, a claim for any balance out- " standing, on the shares shown above, will be made against you,

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[1] Companies (Winding Up) Rules, 1949, r. 88: " When the liquidator " is authorised by resolution . . . to " make a call on the contributories " he shall file with the registrar a " document making the call in the " form 53 in the Appendix with such " variations as circumstances may " require."

"having regard to the provisions of section 212 of the Companies "Act, 1948.[2]"

Nothing whatever was recovered from Williams. According to an affidavit sworn by the liquidator on June 18, 1957, Williams had been ordered by the court on March 5, 1956, to pay the sum of £26,250 on or before March 12, 1956, or subsequently within four days after service of the order on him. The order was served on March 23 but Williams failed to pay the sum or any part of it and stated that he was unable to do so. He submitted to an examination as to his means and made a statutory declaration as to them, subsequently amplified by a further statutory declaration. These declarations showed that he had no free assets of any value. His principal source of income, that is his salary as managing director of National Screen Service Ltd. amounted, after deduction of P.A.Y.E. income tax, to £71 10s. per week. The liquidator said that on August 31, 1956, he obtained a garnishee order nisi against Williams' bank account with a New York bank, but that that had proved abortive as the account had only 15s. in it. He made a further unsuccessful attempt to garnishee Williams' salary from the National Screen Service Ltd. He continued: "My committee of inspection and I "respectfully submit that we have taken all reasonable steps "open to us to obtain payment from Mr. Williams of the amount "due from him. From the inquiries and investigations which we

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[2] Companies Act, 1948, s. 212: "(1) In the event of a company "being wound up, every present and "past member shall be liable to con-"tribute to the assets of the company "to an amount sufficient for payment "of its debts and liabilities, and the "costs, charges and expenses of the "winding up, and for the adjustment "of the rights of the contributories "among themselves, subject to the "provisions of subsection (2) of this "section and the following qualifica-"tions." [Subsection (2) related to directors and managers, and the relevant qualifications were: "(*a*) A "past member shall not be liable to "contribute if he has ceased to be a "member for one year or upwards "before the commencement of the "winding up." This qualification did not exclude the applicants, the B contributories.] "(*b*) A past mem-"ber shall not be liable to contribute "in respect of any debt or liability "of the company contracted after he "ceased to be a member; (*c*) A "past member shall not be liable to "contribute unless it appears to the "court that the existing members are "unable to satisfy the contributions "required to be made by them in "pursuance of this Act; (*d*) in the "case of a company limited by "shares, no contribution shall be "required from any member exceed-"ing the amount, if any, unpaid on "the shares in respect of which he is "liable as a present or past mem-"ber. . . ."

S. 214: "The liability of a con-"tributory shall create a debt (in "England of the nature of a "specialty) accruing due from him at "the time when his liability com-"menced, but payable at the times "when calls are made for enforcing "the liability."

"have made, we have come to the conclusion that Mr. Williams "is unable to satisfy the contributions required to be made by "him under the Companies Act, 1948, and we accordingly desire "to proceed against the 'B' contributories."

On May 3, 1957, the liquidator wrote again to the B contributories: "In my letter of December 21, 1955, I informed you that "the committee of inspection had sanctioned a call on all the "contributories and gave details of the number of shares in "respect of which you were included in the list of 'B' contributories. I further explained that, in the event of non-payment "of the call by the 'A' contributory, a claim would be made "against you, having regard to the provisions of section 212 of "the Companies Act, 1948. No payment has been made by the "'A' contributory and I therefore enclose a formal notice claiming the sum of £(blank) from you." The formal notice was similar to the original notice to Williams: "Take notice that the "committee of inspection in the winding up of this company have "sanctioned a call . . . The amount due from you as a 'B' "contributory in respect of the call, in accordance with section "212 of the Companies Act, 1948, is as follows": and then the calculation was made. "This total sum should be paid by you "direct to me at my office, 27 Martin Lane . . . on or before "May 17, 1957"; and there was added a note about interest.

At a later date one or more of the "old debts" of the company was released or extinguished, the total sum involved was said to be over £13,000.

On June 21, 1957, the liquidator issued a summons for a four-day order against the B contributories in respect of calls made on them. In the course of preparing the evidence the liquidator reduced from £24,289 1s. 9d. to £22,472 17s. 8d. the amount of the debts, namely, "the old debts" incurred by the company prior to July 23, 1953.

On February 25, 1959, the registrar made an order for a total payment by the B contributories of £22,504, allowing a margin of just over £1,000 in respect of the costs of the liquidation. This order, however, was not drawn up.

Following that order the debts of two creditors who had proved in the liquidation and which were owed by the company before July 23, 1953 (when the B contributories transferred their shares), and amounted to £13,853 18s. 11d., were purchased by eight of the B contributories and transferred into the name of Film Finances Ltd. That company, by a deed dated March 2, 1959, released the Apex company, the liquidator and the contributories from all liability for those debts.

On March 18, 1959, an application by eight of the B contributories was made to the registrar, asking him to recall his order of February 25, 1959, and to reduce the amounts to be paid by the B contributories by taking into account the deed of release. The registrar refused that application, and on March 18, 1959, he made an order, which was duly completed, on the B contributories for the payment of calls calculated to produce a total of £22,504. The matter now came before the court on a motion for a declaration that the liability of the B contributories had been reduced by £13,853 18s. 11d. by the release of the two debts mentioned above.

J. G. Strangman Q.C. and *G. B. H. Dillon* for the applicants, the eight B contributories who had purchased debts proved in the liquidation.

Kenneth Mackinnon Q.C. and *Michael Wheeler* for the first respondent, the liquidator of the company.

M. J. Roth for the remaining respondents, B contributories who had not purchased debts.

The submissions made by counsel appear sufficiently from the judgment. All cases cited in argument are all referred to in the judgment.

Cur. adv. vult.

May 7. WYNN-PARRY J. read the following judgment which, after stating the facts as set out above, continued as follows: This case raises an interesting point, particularly when the state of the authorities is appreciated. It is conceded on behalf of the liquidator that such a transaction as took place in this case can be effective to reduce the liability of B contributories, provided that it is done in time. The contention on behalf of the liquidator is that if such transaction is to be effective it must be done before any call is made on the B contributories. On the other hand, the case for the contributories is that the transaction can be performed effectively at any time during the liquidation, or at any rate prior to distribution.

The first authority to which I was referred was *In re Accidental and Marine Insurance Corporation*,[1] in which Giffard

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[1] (1870) L.R. 5 Ch. 428.

L.J., affirming the decision of Stuart V.-C., held that in the winding up of a limited company the contributions of B contributories ought not to be divided exclusively among the old creditors in respect of whose debts they are made contributories, but form part of the general assets of the company for the payment of all the creditors.

In the course of his judgment Giffard L.J. said [2]: "On the "other hand, supposing there was any such right as is now "insisted upon by the appellants, the difficulties that would "arise would be endless, because each creditor, according to the "date at which the members of the company might happen to "retire, would have separate and distinct rights. That alone "would be reason enough for me to say that, unless you find "something in the Act of Parliament which clearly, in the event "of a winding up, gives that right to a creditor, no such right "exists. Looking at the 98th and 133rd sections of the Act [the "Companies Act, 1862], and seeing that the 38th section has "reference only to the liability of members, that partnerships "of this description, which may be more properly termed quasi "corporations, are entirely artificial in their construction, and "that, in point of fact, the past members' liability is entirely an "artificial liability, and introduced much more for the purpose "of preventing persons quite at the last moment leaving a "company, and thereby getting rid of their liability, than for "any other purpose, I think I should be putting a construction "on the Act which was not intended, which the words would "not warrant, which would lead to great inconvenience, and "which would be contrary to the whole spirit of the Act, if I "were to decide in favour of the appellants."

In *In re Blakely Ordnance Co., Brett's Case* [3] (to which I will refer as the first *Brett* case [3]) it was held that where a B contributory bought up and caused to be released to the company all the debts which were due by the company when he ceased to be a shareholder and which remained due at the commencement of the winding up, then, notwithstanding that the money raisable from the A contributories would be insufficient to pay the debts of the company, no call could be made on the B contributory.

Lord Hatherley L.C. made it clear in his judgment that he did not approve of the judgment of Giffard L.J. in *In re Accidental and Marine Insurance Corporation.*[4] At the start of his judgment Lord Hatherley said [5]: "It was most desirable

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[2] L.R. 5 Ch. 428, 432.

[3] (1871) L.R. 6 Ch. 800.

[4] L.R. 5 Ch. 428, 432.

[5] L.R. 6 Ch. 800, 802.

"that this case should be fully argued, regard being had to the "decision of Giffard L.J. in the matter of the *Accidental and* "*Marine Insurance Corporation.*[6] The point in that case was "not exactly the same as that which we have now before us, "but the observations made by the Lord Justice in his judgment, "and the reasoning on which he relied, would be such as certainly "to render a decision in this case, affirming the decision of the "Master of the Rolls, inconsistent with that of Giffard L.J." With all respect to Lord Hatherley, I find difficulty in seeing how the decision in *In re Accidental and Marine Insurance Corporation*[6] can be said to be relevant to the decision of the question before the court in the first *Brett* case.[7]

Lord Hatherley posed the question thus[8]: "The question "is, whether the call can be enforced against Mr. Brett, a "shareholder, there being, at the time the call was made, no "debt which had accrued antecedently to the time of his ceasing "to be such shareholder."

Later in his judgment he said[9]: "One state of things must "arise, of course, upon any construction of this subsection of "the 38th section of the Act of 1862. It cannot be contended "now, that if at the date of the winding up there was no old "debt existing, the past member would be liable. What "difference can it make to the company that the debt has "afterwards ceased to exist? We have in vain asked for an "answer calculated to satisfy the demands of the case. Is it "reasonable that the partners in the company, or the creditors "of the company, should have no rights whatsoever against "past members in the event of all the old debts being cleared "off at the time of the winding up, but that if there should "happen to be an old debt of £1,000 at the date of the winding "up, they should have such a right that it would be impossible "before the call was made for the shareholders who are so "liable for this £1,000 among themselves to club together the "sums it might be necessary to raise, and pay off that liability? "Who can be reasonably said to be wronged by those persons "paying off the debt which they have contracted, liberating the "company from the debt altogether, and discharging themselves "from all further trouble or concern with the company? They "would, in fact, be doing more than they were obliged to do, "because they had a right to call on all the existing members "of the company to help in paying off all the debts."

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[6] L.R. 5 Ch. 428.

[7] L.R. 6 Ch. 800.

[8] Ibid. 803.

[9] Ibid. 805.

As I read that judgment, it proceeds on the basis that the B contributory has a right to buy and release a debt before a call is made on him. It is true that in that case the debt was released before the call was made and it was urged on behalf of the respondents that, that being so, the court did not need to consider whether a release effected after a call had been made would be effective. Nevertheless the ratio decidendi of that case is that the release is effective, if it is effected prior to a call being made.

The next relevant authority in point of time is *Webb* v. *Whiffin.*[10] In this case the House of Lords affirmed the decision of Giffard L.J. in *In re Accidental and Marine Insurance Corporation,*[11] but a number of their Lordships cast doubt on the correctness of the decision in the first *Brett* case.[12] It is to that extent only that it is relevant to refer to *Webb* v. *Whiffin*[13] for the purposes of this judgment. Views were expressed that the liability of B contributories crystallised at the commencement of the winding up and no subsequent dealing with debts in respect of which they were placed on the B list could affect the quantum of their liability.

Following the delivery of the opinions in *Webb* v. *Whiffin,*[13] the first *Brett* case[14] was reheard on a petition of rehearing [*In re Blakely Ordnance Co.*, *Brett's* case[15]] and I will refer to the rehearing as the second *Brett* case.[15] Lord Selborne L.C. posed the relevant question thus[16]: "whether calls can be made "upon past members in respect of any debt or liability of the "company contracted before they ceased to be members, which "has been released or extinguished between the date of the "winding-up order and the time of making such calls, and which, "therefore, cannot participate in any dividend which may be "made out of the proceeds of such calls."

He continued[16]: "Neither of these questions came before "the House of Lords for decision in *Webb* v. *Whiffin,*[17] but "observations bearing more or less upon them were made by "four of the noble and learned Lords who then advised the "House, and some variety of opinion may be traced in those "observations. Certain passages in the speeches of Lord Chelmsford and Lord Cairns have been relied upon before us, as "favouring the view, that the measure of the liability of a past

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[10] (1872) L.R. 5 H.L. 711.

[11] L.R. 5 Ch. 428.

[12] L.R. 6 Ch. 800.

[13] L.R. 5 H.L. 711.

[14] L.R. 6 Ch. 800.

[15] (1873) L.R. 8 Ch. 800.

[16] Ibid. 807.

[17] L.R. 5 H.L. 711.

"member under the 38th section [of the Companies Act, 1862], "so far as it depends upon the existence of debts of the company "contracted before he ceased to be a member, ought to be "determined solely by the amount of such debts as they stood "at the commencement of the winding up, without reference to "any subsequent event by which that amount may have been "reduced or even wholly extinguished."

Later there occurs this very relevant passage[18]: "To swell "the amount of that indebtedness, by the fictitious process of "treating as then due and unpaid any part of the original amount "of those debts and liabilities which might have been previously "satisfied by dividends out of the property in hand, or by the "contributions of present members, or any part thereof which "might have been previously released or extinguished—to do this "(as it necessarily would be done in such a case as *Brett's*[19]) "for the sole purpose of increasing the dividends of those other "creditors whose debts were contracted after these past members "had left the company, would, as it seems to me, be a violation "both of the letter and of the spirit of the second subsection. "It would be introducing, for the benefit of the subsequent "creditors and to the prejudice of the past members, that very "principle of marshalling which (when proposed to be introduced "for the benefit of the prior creditors) was excluded by the "decision of the House of Lords in *Webb* v. *Whiffin.*[20] In this "section, and in sections 74, 75, 'liability to contribute to the "'assets of the company in the event of the same being wound "'up' appears to me to be merely another expression for "liability to calls under section 102; and those calls are to be "made, to the extent of the liability of the several contributories, "for payment of all or any sums which the court deems necessary "to satisfy the debts and liabilities of the company—that is to "say, in the case of past members—debts and liabilities contracted before they ceased to be members, and still constituting part of the indebtedness of the company when the calls "are made. This, with such costs and adjustment moneys (if "any) as may be properly incident thereto or consequent thereon, "is, in my opinion, the extreme measure and limit of the liability "of past members to contribute to the assets of the company "under section 38. To enlarge that limit, because the fund, "when contributed, will be divisible pro rata among all the "creditors of the company, at whatever time their debts may

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[18] L.R. 8 Ch. 800, 809.

[19] Ibid. 801.

[20] L.R. 5 H.L. 711.

" have been contracted, would, as it seems to me, be at least as " much against the express words and the real meaning of section " 38 (2), as the appropriation of the fund contributed by past " members to the payment of the particular class of creditors in " respect of whose debts they are called upon to contribute could " possibly be against the letter or spirit of sections 98 and 133.

" The time when the call is made must necessarily be looked " to, and the payments of present members after the commence- " ment of the winding up must necessarily be taken into account, " for the purpose of giving effect (in the case of a limited com- " pany) to another material qualification of the liability of past " members, contained in the 38th section, viz.: that 'no con- " 'tribution shall be required from any member exceeding the " 'amount, if any, unpaid on the shares in respect of which " 'he is liable as a present or past member.' Why, then, are " not the payments made after the commencement of the winding " up equally to be regarded, when the question has reference to " the amount of the debts and liabilities of the company, in " respect of which a past member is required to contribute? "

Pausing there, it is, I think, clear that Lord Selborne is considering only the case of a release of a debt prior to a call being made on the B contributory concerned. He is not envisaging a release at any later stage of the liquidation.

Then follows a passage on which Mr. Strangman for the applicants strongly relied.[21] " Let it be supposed, that, after " a winding-up order, all the debts due when the latest transfer " by a past member was executed were absolutely released by " the creditors, or voluntarily paid off by a stranger in exonera- " tion of the whole company, before the payment of a dividend " by the company upon any part of them. How could a call " on past members 'in respect of' these debts—a call the pro- " ceeds of which would create a fund for division exclusively " among the subsequent creditors—be justified under such cir- " cumstances by the statute? What would be true in that " case of all the prior debts seems to be equally true of any " prior debt, or any part of a prior debt, in any lawful manner " released, paid off, or extinguished; and, as the property in " hand at the date of the winding up, and the contributions of " all the present members, were primarily and justly liable to " pay all the debts of the company rateably and equally, as far " as they would extend, before any liability of past members

[21] L.R. 8 Ch. 800, 811.

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"could arise, I am unable to perceive any sound distinction "between the effect of a part payment so made, and a reduction to the same extent of the same debts by any other means."

I am unable to see how that passage helps the applicants' case. True, Lord Selborne uses the phrase, "before the payment of a dividend by the company," but, having stated the hypothetical example, he then poses the question,[22] "How could "a call on past members 'in respect of' these debts—a call "the proceeds of which would create a fund for division exclusively among the subsequent creditors—be justified under "such circumstances by the statute?"

It appears to me that the inescapable effect of that passage is to demonstrate that Lord Selborne is proceeding on the basis that the release precedes the call. I conclude, therefore, upon an analysis of both the *Brett* cases[23] that they are authority only for the proposition that a release of a debt in respect of which a B contributory is liable to be placed on the B list will be effective if it is brought about before a call is made on that B contributory.

In between the hearings of the first *Brett* case[24] and the second *Brett* case,[25] *In re Greening & Co., Marsh's Case*,[26] came before Bacon V.-C. The headnote is as follows[26]: "Past members of a company settled upon the B list of contributories "having bought up the debts to which they were liable, *held* "liable to pay the costs of settling the B list, unless the liquidator "had money in his hands sufficient to pay them."

The statement of facts shows that the debts in question were bought up after the call had been made on the B contributories concerned. In the report of the argument of Mr. Amphlett, this appears[27]: "As soon as the debts existing when the B "contributories retired have been satisfied, and it is immaterial "whether payment has been made before or after the call— "*Brett's* case,[28] overruling the judgment of Giffard L.J. in *In* "*re Accidental and Marine Insurance Corporation*[29]—their "liability ceases." Although, therefore, the question before the court was really one relating to costs, it cannot be said that the point was not mentioned that the release could be effective even if made after call.

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[22] L.R. 8 Ch. 800, 811.

[23] L.R. 6 Ch. 800; L.R. 8 Ch. 800.

[24] L.R. 6 Ch. 800.

[25] L.R. 8 Ch. 800.

[26] (1871) L.R. 13 Eq. 388.

[27] Ibid. 389.

[28] L.R. 6 Ch. 800.

[29] L.R. 5 Ch. 428.

At the end of his judgment Bacon V.-C. said[30]: "Nor can "I give the B contributory any costs, and for this reason, that "although he has since satisfied the court that he is under no "obligation to pay any money in respect of debts for which he "was liable, he has not until lately—the present moment almost "—acquitted himself of that obligation. He had a right to "reduce the amount of call; he had a right to pay off the debts, "as he has done, as effectually as in *Brett's* case.[31] But I can "give him no costs of that proceeding, because his acquitting "himself of the obligation came too late in the day. I give no "costs against him."

It is clear from that passage that Bacon V.-C., for the purpose of coming to a decision as to the incidence of costs, proceeded on the basis that a buying up of an old debt and a release in respect thereof was effective even if made after call. If I can properly treat *Marsh's* case[32] as an authority on the point before me, then I apprehend that I ought to treat myself as bound by it, in which event the case would be concluded in favour of the applicants.

On consideration, however, I do not think that I should follow that course. There does not appear to have been any substantial debate on the question whether a release after call is effective. It appears really to have been assumed that that was the case. Here I have the question directly raised and I think that I ought to examine it and express my own view on it.

I think that the answer turns on two sections of the Companies Act, 1948, namely, sections 212 and 214. Section 212 provides how the liability of a contributory is to be measured. Thus, the first duty of the liquidator in the case of B contributories is to quantify their liability by applying the relevant provisions of section 212. No doubt an element of estimation will enter into his calculation, but that does not affect the matter, because any necessary adjustment can be made later: see *In re City of London Insurance Co. Ltd.*[33] When the liquidator has quantified the liability of the B contributories he makes a call on them, assuming of course that default is made in whole or in part by the A contributories.

By section 214 the liability of the contributory, which came into existence when he first became a member, creates a debt which in England is in the nature of a specialty. That debt becomes payable when a call is made. That result is brought about by the express terms of section 214. It follows, to my mind, that once that debt becomes payable the only way in which it can be extinguished is by payment, and that once the debt becomes payable it is not open to a B contributory to reduce his liability by buying up any of the debts owed by the company before he transferred his shares, because the result of so doing would be to reduce the amount of the debt which the statute clearly says that he owes.

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[30] L.R. 13 Eq. 392.

[31] L.R. 6 Ch. 800.

[32] L.R. 13 Eq. 388.

[33] [1932] 1 Ch. 226; 48 T.L.R. 169.

On this reasoning there is no room for extending the rule laid down in the two *Brett* cases.[34] If it were to be extended, I can foresee grave administrative difficulties arising in liquidations where B contributories are involved. It is true that my conclusion is contrary to the view accepted by Bacon V.-C. in *Marsh's* case,[35] but for the reasons I have given I have felt it necessary to come to my own conclusion on the matter and I feel free to give effect to that conclusion.

In the result the motion will be dismissed.

I will make a declaration that the liability of the B contributories of the company has not been reduced by £13,853 18s. 11d. by the release of the debt of £12,000 for which London Independent Producers proved as a creditor in the liquidation of the company nor by the release of the debt of £1,853 18s. 11d. for which A.C.T. Films Ltd. proved as a creditor in the liquidation of the company.

Declaration accordingly.

I. G. R. M.

The eight B contributories appealed. During the hearing of the appeal it was conceded by counsel for the liquidator that the notification of May 3, 1957, was not an effective call on the B contributories, since form 53 of the Appendix to the Companies (Winding Up) Rules, 1949, had not been filed as required by rule 88. Counsel submitted that the call made on December 20, 1955, was effective as against the B contributories.

G. B. H. Dillon for the applicants, eight of the B contributories.

K. W. Mackinnon Q.C. and *M. M. Wheeler* for the respondent liquidator.

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[34] L.R. 6 Ch. 800; L.R. 8 Ch. 800.

[35] L.R. 13 Eq. 388.

In addition to the cases referred to in the judgments the following were cited in argument: *Webb* v. *Whiffin*[36]; *Helbert* v. *Banner (In re Barned's Bank)*[37]; *Williams* v. *Harding*.[38]

[In view of the decision that there had in fact been no effective call on the B contributories, the question argued before Wynn-Parry J. as to the date for fixing the liability of the B contributories became academic and the submissions of counsel do not call for report.]

Cur. adv. vult.

Dec. 15. Lord Evershed M.R. This case is concerned with a question which (for obvious reasons) rarely comes before the court, namely, the liability, in a winding up of an insolvent company, of the B contributories. The extent of such liability is defined by section 212 of the Companies Act, 1948, which I shall presently read so far as it is relevant; but the extent has also been stated in summary form by Eve J. in *In re City of London Insurance Co. Ltd.*,[1] and I gratefully adopt what that learned judge said. "Their liability to contribute is created by statute, "and is restricted to so much of the amount left unpaid on their "shares by their associated A contributories as does not exceed "the balance of the debts and liabilities of the company, con-"tracted before they respectively ceased to be members, which "remains unpaid after the assets of the company and the contribu-"tions of the A contributories have been applied pari passu towards "the payment of all the debts of the company whenever "contracted."

The question more precisely debated before us may be stated thus: Is there some point of time (and if so, what is it?) when the liability of the B contributories must be taken (subject at most to adjustment to allow for errors in estimation and the like) as fixed so as not thereafter to be capable of reduction as the result of total or partial extinguishment of debts contracted before they (that is, the B contributories) ceased to be members?

It is conceded (since *In re Blakely Ordnance Co., Brett's Case (No. 2)*[2]) that the liability is not fixed at the date of the winding up, but that it may be reduced as a result of dealings with the "old debts" (as I will call them) up to the date of the call made on the B contributories for their contribution. But it is said by the liquidator in this case, and it was held by Wynn-Parry J. in the court below, that the liability is crystallised at the date of such call and cannot be affected by anything done thereafter. This view is said to be supported by the terms of section 214 of the Act and by the language and the reasoning of Lord Selborne L.C. in *Brett's Case* (*No. 2*)[3] above mentioned—language quoted by the judge, but which I need not repeat. On the other hand, it is said that there is no logic nor justice in drawing the line at the date of the call (or, indeed, at any other point short, at any rate, of final distribution); and this view is said to be supported by the decision of Bacon V.-C. in *In re Greening, Marsh's Case*,[4] and by Eve J. in the case I have already mentioned, *In re City of London Insurance Co. Ltd.*[5]; and also by the uniform views expressed in every edition of Buckley on the Companies Acts, and in the relevant volumes of Halsbury's Laws of England.

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[36] (1872) L.R. 5 H.L. 711.

[37] (1871) L.R. 5 H.L. 28.

[38] (1866) L.R. 1 H.L. 9.

[1] [1932] 1 Ch. 226, 230; 48 T.L.R. 169.

[2] (1873) L.R. 8 Ch. 800.

Without multiplying citation, I refer to a passage in Buckley, 13th ed. at p. 434: " The rules, then, which have been established " with respect to the contributories of a company in liquidation " and the application of their contributions may be briefly stated " in some such form as the following. . . . " There follow five heads in Roman numerals, and the fifth is: " If, before a call is " made upon the B list, or before payment of such call, the debts " in respect of which a B contributory was, having regard to sub- " section (1) (*b*) " (that is, of section 212) " liable to contribute, " or any of them, are in any manner released or extinguished in " whole or in part, his liability to contribute to the assets of the " company is (subject to any question as to the costs of the " winding up) thereby pro tanto discharged." Against the words " or before payment of such call " reference is made to a note, and in the note is a citation of *Marsh's* case,[6] which I have already mentioned.

[His Lordship stated the facts, read sections 212 and 214 set out above, and the relevant winding-up rule 88, commenting that sections 212 and 214 appeared to have remained substantially and (so far as relevant) entirely in the present form since the Companies Act, 1862, the corresponding sections being sections 38 and 75 respectively. His Lordship went on:] There is no doubt, I think, that the call of December 20, 1955, was a valid call under the Act and in accordance with rules; but it was not, and could not be, in my judgment, an effective call for any purpose on the B contributories. I say that for two reasons. First, at that date the B contributories were not under any liability, since the conditions under section 212 for such liability, and particularly the condition or qualification in paragraph (*c*) of that section, was not then satisfied—(*c*) being (as it will be remembered) in this form: "a past member shall not be liable to contribute unless "it appears to the court" (or, I would add, to the liquidator) "that the existing members are unable to satisfy the contributions "required. . . ." The second reason for my conclusion is that it is quite clear from the liquidator's letter to the B contributories of December 21, 1955, that he, the liquidator, did not himself so regard it.

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[3] L.R. 8 Ch. 800, 810.

[4] (1871) L.R. 13 Eq. 388.

[5] [1932] 1 Ch. 226.

[6] L.R. 13 Eq. 388.

[His Lordship referred to the affidavit evidence of the liquidator, summarised above, and went on:] Wynn-Parry J. decided the present case on the basis that the liquidator's letter to the B contributories of May 3, 1957, amounted to a call. Mr. Mackinnon before us conceded that this cannot be so, since the requirement of the winding-up rules,[7] and particularly rule 88 and the appended form 53, which is required to be used on the occasion of a call, had not been complied with; and in the circumstances Mr. Mackinnon was compelled to say that what the liquidator did on December 20, 1955, amounted to a call on the B contributories for the purposes of section 214: that is to say, he contended that the debt which section 214 states to be created became payable at the time when that call was made on December 20, 1955. But, in my judgment, this cannot be sustained. Whatever be the exact construction of section 214 (and particularly of the phrase at the beginning of the section, "the liability "of a contributory" in its context) the B contributories were, at December 20, 1955, by virtue of the clear terms of section 212, and particularly subsection (1) (*c*), under no liability at all: so that there was then nothing capable of being called or of crystallising—and this view is plainly in accordance (as I earlier stated) with what the liquidator thought and intended according to the letter that he wrote on December 21, 1955, and according to the evidence of his affidavit.

The matter may, I suggest, be tested by asking: Could the liquidator, on January 4, 1956 (which was the day after the date fixed for payment by the A contributory in his notice of December 20 to Mr. Williams) have sued the B contributories as for a specialty debt? In my judgment, the answer to that question must quite plainly be in the negative. Such an action would not

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[7] Companies (Winding Up) Rules, 1949.

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have lain, because at that time the liquidator could not establish, in terms of section 212, that the B contributories were under any liability whatever.

The result, then, seems to me to be inevitable: there has been since December 20 no other call which satisfies the requirements of the Act and the regulations; so that any extinguishment of old debts, whole or partial, which has so far occurred must, on the admitted authority of *Brett's Case* (*No. 2*)[8] operate to reduce the liability of the B contributories.

This conclusion is sufficient to dispose of the present case in favour of the appellants; and I prefer, for my part, to express no concluded view upon the more general, but interesting and difficult, question which has been argued before us. Wynn-Parry J. thought that *Marsh's* case[9] could not be treated as an authority, since the point was not really argued but rather assumed; and he further pointed out that *Marsh's* case[9] was decided before *Brett's Case* (*No. 2*),[10] and that the ratio of the latter was that the date of the effective call was the determining date.

It must be said that Mr. Dillon, to my mind, has produced at any rate a formidable argument the other way, particularly in light of the consistent statements in all the editions of Buckley and Halsbury (which were not referred to by Wynn-Parry J. in his judgment) and of Eve J.'s judgment in 1932. But if the date of the effective call is not the determining date, then it is clear to my mind that it is a difficult question to say what is the correct date. For example, what is the position if an "old debt" is wholly or partially extinguished after a B contributory has paid the whole or part of a call? What is the position if there are successive calls and some change has occurred in the "old debts" between the two? Is the result the same or different for B contributories (a) when an "old debt" is at some stage after a call extinguished, and (b) when the liability of an A contributory, properly regarded at the time of the call as worthless, is then wholly or partially (but unexpectedly) discharged?

In the circumstances of the present case, these questions are academic, and I prefer, therefore, to leave them open, expressing no view of my own upon them and thinking that a decision on them should await a case when such a decision is necessary—which I think all the more important since (as I stated at the beginning of my judgment) cases concerning the liability of B contributories are only likely to arise very rarely, and may arise in very special circumstances which it is impossible to forecast.

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[8] L.R. 8 Ch. 800.

[9] L.R. 13 Eq. 388.

[10] L.R. 8 Ch. 800.

For the reasons I have stated, I think that the appeal should be allowed.

Romer L.J. I agree. It is expressly provided by section 212 (1) (*c*) of the Companies Act, 1948, that a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. In other words, the liability of the B contributories to contribute on a winding up does not arise at all unless it appears to the court (or, by delegation, the liquidator) that the A contributories are unable to satisfy the calls made upon them; and the B contributories' liability is in any case limited to the extent of the A contributories' default. It was thought when this case was before Wynn-Parry J. that the call on the B contributories which was relevant for consideration was made on May 3, 1957, by which date it had become apparent that the A contributory had defaulted on his liability; and the problems which would have arisen upon that footing were argued before the judge and decided by him. In the course, however, of the discussion before this court it transpired that the call which the liquidator made on the B contributories by his letter and notice of May 3, 1957, was not in fact effectual inasmuch as form 53 of the appendix to the winding-up rules was not filed as required by rule 88. The only occasion upon which form 53 was filed was on December 20, 1955, upon which date the liquidator made a call upon all the contributories of the company, both A and B; and, accordingly, Mr. Mackinnon conceded that it was upon that call alone that he could rely. Upon that basis it is quite clear that, by reason of the provision of the section 212 (1) (*c*) above referred to, the liability of the B contributories has never yet arisen; for on December 20, 1955, the liquidator did not know and could not know to what extent (if at all) the A contributory would default in his contribution. It is plain from the liquidator's circular letter of December 21, 1955, to the B contributories that he did not regard himself as already having made a claim on them; and, indeed, his letter of May 3, 1957, shows that he did not regard a claim as having been made upon them even up to that date. In addition, there is ample evidence that for a long period after December 20, 1955, the liquidator made constant but unsuccessful efforts to obtain the contribution for which the A contributory was liable.

The position, then, quite shortly, is that no effectual call had been made on the B contributories by March 2, 1959, upon which date two of the "old" debts in respect of which these contributories would be liable by reason of the A contributory's default were released; nor has any valid call been made upon them since. It follows from this *Brett's Case* (*No. 2*),[11] that the release of these debts operated to reduce, to the value of the debts, the liability of the B contributories.

Upon this point, therefore, the appeal must be allowed; and, with Lord Evershed M.R., I prefer to express no opinion on the points with which Wynn-Parry J. dealt in his judgment, but which, as it now appears, do not in fact arise for decision in the present case.

LORD EVERSHED M.R. I have been authorised by Sellers L.J. to say that he concurs in the judgments which have just been delivered.

Appeal allowed, with costs of appeal and of hearing before Wynn-Parry J. Registrar's order to be varied.

Solicitors: *Allen & Overy; Linklaters & Paines.*

E. D.

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[11] L.R. 8 Ch. 800.

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Nov. 19, 20.
Wynn-Parry J.

STYLO SHOES LTD. *v.* PRICES TAILORS LTD.

[1959 S. 2174.]

Landlord and Tenant—Act of 1927*—Notice to quit—Service of notice—Limited company tenants of business premises—Removal by company to new registered office—Notice determining tenancy sent by post to old address—Letter containing notice redirected and received by company—Whether valid service—"Place of abode"—"Person"—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 23 (1), 25 (1)*—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 25 (1), 66.

Statute—Construction—Service of document by post—Meaning of "place "of abode" and "person"—Limited company—Landlord and Tenant Act, 1927, *s.* 23 (1).

A company incorporated under the Companies Act, 1929, were the tenants of business premises in Manchester for a term of 21 years from November 1, 1938. At the date of the lease the tenants' registered office and principal place of business were in Huddersfield, but on February 2, 1957, they transferred them to Leeds, at the same time sending notice of the change to their customers and to the landlords of the Manchester premises. They also instructed the Huddersfield postmaster to redirect all their correspondence to the Leeds address. On November 25, 1958, the landlords sent to the tenants at the Huddersfield address a registered letter in which was enclosed a notice under section 25 of the Landlord and Tenant Act, 1954, to determine the tenancy on December 2, 1959, which letter was received by the tenants at their Leeds address after it had been redirected by the Huddersfield postmaster. On a summons by the tenants for a declaration that the landlords' notice of November 25, 1958, having been sent through the post in a registered letter to their secretary at a place not being their principal office nor their last known place of abode nor their registered office was not duly served on them pursuant to section 66 (4) of the Landlord and Tenant Act, 1954, and section 23 (1) of the Landlord and Tenant Act, 1927 [1]:—

Held, (1) that the word "person" in section 23 (1) of the Act of 1927 was wide enough to include a limited company which was intended by the Act to have the benefits thereby conferred, and to be subject to the obligations thereby imposed, on a tenant, and the provisions of that subsection applied.

(2) That there had been a valid service of the notice under section 23 (1). The purpose of the section was to ensure that a notice was given and actually received, and its requirements were

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[1] Landlord and Tenant Act, 1927, s. 23 (1): "Any notice, request, "demand or other instrument under "this Act shall be in writing and "may be served on the person on "whom it is to be served either per"sonally, or by leaving it for him at "his last known place of abode in "England or Wales, or by sending "it through the post in a registered "letter addressed to him there, or, "in the case of a local or public "authority or a statutory or a public "utility company, to the secretary or "other proper officer at the principal "office of such authority or company, "and in the case of a notice to a "landlord, the person on whom it is "to be served shall include any agent "of the landlord duly authorised in "that behalf."

S. 25 (1): ". . . 'statutory com"'pany' means any company con"stituted by or under an Act of "Parliament to construct, work or "carry on any gas, water, electricity, "tramway, hydraulic power, dock, "canal or railway undertaking. . . ."

Landlord and Tenant Act, 1954, s. 24 (1): "A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions of "this Part of this Act; and, subject "to the provisions of section 29 of "this Act, a tenant under such a "tenancy may apply to the court for "a new tenancy. . . ."

S. 25 (1): "The landlord may "terminate a tenancy to which this "Part of this Act applies by notice "given to the tenant in the prescribed "form . . ."

S. 66 (4): "Section 23 of the "Landlord and Tenant Act, 1927 "(which relates to the service of "notices), shall apply for the purposes "of this Act."

satisfied if a letter containing the notice was delivered to and in fact received by the person to whom the notice was given; in the case of a limited company "place of abode" meant "place of "business"; so far as the second mode of service was concerned, the act of sending a letter through the ordinary post was equivalent to "leaving it . . . at his last known place of abode"; and that, therefore, since the letter was in fact delivered and received, the landlords' failure to specify the correct address did not invalidate the service under the section.

Sharpley v. *Manby* [1942] 1 K.B. 217; 58 T.L.R. 91; [1942] 1 All E.R. 66 applied.

Held, further, that section 23 (1) was permissive as to mode of service, and the modes set out therein were not exhaustive, and that, as the clear intention of the legislature that the notice should be received by the person intended to receive it had been achieved, it was immaterial that the letter had reached the tenants by way of their old address.

Tennant v. *London County Council* (1957) 55 L.G.R. 421 applied.

ADJOURNED SUMMONS.

The following statement of facts is taken substantially from the judgment of Wynn-Parry J.

A company incorporated under the Companies Act, 1929, Stylo Shoes Ltd. (hereinafter called "the tenants"), previously called the Stylo Boot Company Ltd., were tenants of premises at 41, Market Street, Manchester, for a term of 21 years from November 1, 1938, under a lease dated October 11, 1938.

At the date when the lease was granted, the tenants' registered office and principal place of business was 15/17, Chancery Lane, Huddersfield. On February 2, 1957, they transferred their registered office and principal office and place of business from Huddersfield to Conway Road, Harehills Lane, Leeds. They took the precaution on that occasion of sending out circulars not only to their customers but also to the landlords, Prices Tailors Ltd., giving notice that they had changed their registered office and principal place of business to Conway Road, Harehills Lane, Leeds, and the court drew that inference from the form of circular sent out. On March 4, 1957, and annually thereafter, the tenants gave a written direction to the postmaster of Huddersfield directing him to readdress all correspondence to their new address at Conway Road, Harehills Lane, Leeds.

On November 25, 1958, the landlords addressed to the tenants at their old address at Huddersfield a registered letter enclosing a notice pursuant to section 25 of the Landlord and Tenant Act, 1954, to determine the tenancy on November 2, 1959. Nothing turned on the form of the notice which was enclosed with that letter. As a result of the directions which had been given to the postmaster at Huddersfield, the letter was in fact received by the tenants at their Leeds address on December 2, 1958.

Following on the receipt of that letter, on January 2, 1959, the tenants wrote two letters, or caused two letters to be written by their solicitors, to the landlords. The first read: "Our clients, "the Stylo Boot Company Ltd., have handed us a notice of "termination of tenancy from you to them in respect of the above "property dated November 25, 1958. We hereby give you notice "that our clients will not be willing to give up possession of the "premises on the date specified in the notice." That paragraph amounted to the counter-notice contemplated by the Act. The letter continued: "Our clients do not admit the validity of the "notice served and this reply thereto is given without prejudice "to any contention that our clients may hereafter raise respecting "the validity of the notice." The second letter the tenants' solicitors wrote to the landlords read: "Our clients, the Stylo "Boot Company Ltd., have handed us your notice requiring "information," and the information required by the statute was then given.

On March 16, 1959, the tenants issued an application in the Manchester County Court seeking a new tenancy, paragraph 4 of which referred to the date, November 25, 1958, of the giving of the notice. It was then realised that the Manchester County Court had no jurisdiction to deal with the matter, because of the amount of the rateable value of the premises, and the tenants took the necessary step by way of application to have the matter transferred to the High Court. They then took an appointment before the master on June 16, 1959, asking for directions as to filing evidence. The evidence was not filed and on July 15 the landlords restored the summons for hearing on July 28, 1959. On July 30, 1959, the tenants took out this originating summons raising for the first time in specific terms the reasons which they sought to advance for saying that the notice was not a valid notice.

By the summons they asked, inter alia, for a declaration that the notice, purporting to be a notice by the landlords, as landlords of the premises, to the tenants as tenants thereof, the tenants being a company regulated by the Companies Act, 1948, to determine the tenants' tenancy thereof on November 2, 1959, and sent through the post in a registered letter addressed to the tenants'

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secretary at a place not being the tenants' principal office—and here there was added by amendment by leave of the court during the hearing, the words "nor their last known place of abode nor "their registered office"—was not duly served on the tenants pursuant to section 66 (4) of the Landlord and Tenant Act, 1954, and section 23 (1) of the Landlord and Tenant Act, 1927.

A. E. Holdsworth for the tenants. There has not been compliance with section 23 (1) of the Act of 1927. Personal service was impossible as the tenants are a company incorporated under the Companies Act, 1929: the notice was not left for them at their "last known place of abode in England or Wales"; true, it was sent "through the post in a registered letter addressed "to" them—but not "there," i.e., at that "last known place "of abode," since it was addressed to the office which they had left, and it was not sent to the tenants' "secretary or other "proper officer."

Further, the letter of January 2, 1959, written by the tenants' solicitors to the landlords was not an unequivocal representation of fact. All that was being done thereby was to take a precaution on the tenants' behalf: *Bolsom (Sidney) Investment Co. Ltd.* v. *Karmios (E.) & Co. Ltd.*[2] Alternatively, if what was contained in it did constitute a representation, that representation was not acted on. For the reasons which have emerged during these proceedings the tenants' application for a new tenancy never became effective, so the representation, if any, was not acted on. [Reference was made to *In re the Estate of Park, decd.*[3]]

For these reasons it is submitted that the notice was not duly served.

J. T. Plume for the landlords. The real and the only issue is whether notice within the meaning of section 25 (1) of the Landlord and Tenant Act, 1954, has been given. It is sufficient if notice is given. How it is given is immaterial, so long as it is given; and whether it is given is a question of fact. The court can assume that notice has been given if the statutory provisions have been complied with. In the present case the notice was "in writing" as prescribed by section 23 (1) of the Act of 1927, and it was "given to the tenant in the prescribed form" within the meaning of section 25 (1) of the Act of 1954.

Further, if one of the methods provided by section 23 (1) of the Act of 1927 by which parties can serve a notice has been adopted (as in this case it has), the proof that that has been done is prima facie proof of service, enabling strict proof of service to be given.

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[2] [1956] 1 Q.B. 529; [1956] 1 All E.R. 536.

[3] [1954] P. 89; [1953] 2 All E.R. 1411.

As to the meaning of "abode," it has been held that, for the purposes of the service of a summons for non-payment of a general district rate, the ratepayer's place of business is to be treated as his "residence" within the meaning of section 267 of the Public Health Act, 1875, although he does not sleep there, and that service of such a summons at his place of business under that section will be good, notwithstanding the provisions of section 256 of the Act and of section 1 of the Summary Jurisdiction Act, 1848, under which it has been held that a man's place of business at which he does not sleep is not his "place of abode": *Rex* v. *Braithwaite*.[4]

Assuming that either section 23 (1) of the Act of 1927 applies or that the Companies Act, 1948, applies, the landlords, if they send by post a letter wrongly addressed (as they did), can fall back either on the method "by leaving for him at his last known "place of abode . . ." or, under the Companies Act, 1948, by leaving it at the tenants' registered office. The landlords' strong point here is that, wherever the notice may have been posted to in the first place, in fact the tenants received it. It was "delivered to and received by" them, and so there was a "valid service of the notice" on them: *Sharpley* v. *Manby*.[5] [Reference was made to *Tennant* v. *London County Council*[6]; *Morecambe and Heysham Corporation* v. *Warwick*[7]; *Ex parte Portingell*[8]; *Reg.* v. *Deputies of Freemen of Leicester*.[9]]

Holdsworth in reply. It is possible that (1) the service clause of the Act of 1927 limits service on companies to service on "the "secretary or other proper officer at the principal office of such ". . . company," or (2) that that service clause is exhaustive and the methods therein prescribed are exhaustive, or (3) that that clause and those methods are not exhaustive, and that sending the letter by ordinary post is good enough provided that the result of so doing is that the company is served. *Sharpley* v. *Manby*[10] is the most formidable of the authorities cited on the landlords' behalf. *In re Follick (J. & M.) Ltd.*[11] is an example of the usefulness of a provision that notice may be served at the last known address of the person to be served; but, once the section provides (as in the present case) a form of service, the landlord is not entitled to serve at any other address. That was not put to the court in *Sharpley* v. *Manby*,[12] which may therefore be distinguished.

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[4] [1918] 2 K.B. 319; 34 T.L.R. 406.

[5] [1942] 1 K.B. 217; 58 T.L.R. 91; [1942] 1 All E.R. 66.

[6] (1957) 55 L.G.R. 421.

[7] (1958) 56 L.G.R. 283; 9 P. & C.R. 307.

[8] [1892] 1 Q.B. 15; 8 T.L.R. 40.

[9] (1850) 15 Q.B. 671.

[10] [1942] 1 K.B. 217.

[11] (1907) 97 L.T. 645; 52 S.J. 13.

Finally, the use of "shall" in section 23 (1) of the Act of 1927 is not only mandatory but imperative; the use of the "may" therein is, on the other hand, not even permissive; it is used simply to indicate an alternative mode of service.

WYNN-PARRY J. stated the facts substantially as set out above and continued: Under the provisions of the Landlord and Tenant Act, 1954, the validity or otherwise of the service of the requisite notice is to be determined by reference to section 23 of the Landlord and Tenant Act, 1927. [His Lordship read that section and continued:] The first observation which I would make is that there are four ways of effecting service: first, on the person on whom it is to be served personally; secondly, by leaving it for him at his last known place of abode in England or Wales; thirdly, by sending it through the post in a registered letter addressed to him there—that is at his last known place of abode in England or Wales—and the fourth, which is a special case, refers to the case of a local or public authority or a statutory or a public utility company.

I think that I can dispose of the fourth case by reference to section 25, the definition section in the Act of 1927. It has been urged that I am not bound by the definition of "statutory "company" in section 25 (1) because all that is done so far as regards section 66 of the Landlord and Tenant Act, 1954, with its provisions as to notice, is to make section 23 of the Landlord and Tenant Act, 1927, apply for the purposes of the later Act. But the phrase "statutory company" is not a self-explanatory phrase, and it appears to me that on any question involving an interpretation of section 23 I am necessarily bound to turn for help to the definition section, section 25 of the Act of 1927. There the expression "statutory company" is given a very special meaning. It means "any company constituted by or "under an Act of Parliament to construct, work or carry on any "gas, water, electricity, tramway, hydraulic power, dock, canal "or railway undertaking." It is therefore a definition which effectively excludes this company from falling under the phrase "statutory company" for the purposes of this case. That means that the defendants were left to effect the service otherwise than under the latter part of the section. As the plaintiffs are a company incorporated under the Companies Act, 1929, the first method, namely, personal service, could not be effected. Therefore, one is left with the second and third methods, "by leaving "it for him at his last known place of abode, or by sending it "through the post in a registered letter addressed to him there."

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[12] [1942] 1 K.B. 217.

The word "him" is used in both cases, but I entertain for myself no doubt that the word "person" in section 23 (1) is to be taken to be wide enough to include a company incorporated under the Companies Act. A perusal of the Act shows one again and again that, while no express reference is made to a company incorporated under the Companies Act, such an artificial person (and, after all, a company is only an artificial person) is to have the benefits conferred by the Act and be subject to the obligations imposed by the Act on a tenant. Therefore, I regard section 23 (1) as applying to a limited company, and, therefore, it applies to the plaintiffs. In this case the third method was not followed in the sense that, although the defendants sent the notice by registered letter, they did not address the letter to the correct address, namely, Conway Road, Harehills Lane. It is therefore argued that the provisions of the section were not complied with. If that argument was correct, then there is an air of utter unreality about this case, because it is conceded that the letter was in fact received by the plaintiffs on December 2, 1958.

The matter is not free from authority. I was referred to *Sharpley* v. *Manby*.[1] The headnote reads: "A rent audit notice, "stating that an estate rent audit will be held at a certain time "and place, and requesting a tenant then to pay the rent due "from him, is a sufficient notice in writing to the tenant requiring "him to pay the rent within section 12 (1) (*b*) of the Agricultural "Holdings Act, 1923, and if such a notice is sent to the tenant "by the ordinary non-registered post and is delivered to and "received by him, there is a valid service of the notice on him "under section 53." Section 53 is worth reading because it is for all practical purposes in the same terms as the material part of section 23 (1) of the Landlord and Tenant Act, 1927. It reads: "Any notice . . . under this Act may be served on the person to "whom it is to be given either personally, or by leaving it for

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[1] [1942] 1 K.B. 217; 58 T.L.R. 91; [1942] 1 All E.R. 66.

"him at his last known place of abode in England, or by sending "it through the post in a registered letter addressed to him "there." The leading judgment in that case was given by MacKinnon L.J. He said in the course of his judgment[2]: "Whether the facts were ever gone into by the arbitrator I do "not know, but the special case seems to assume that the letters "were delivered by ordinary post and received by the tenant. "The whole argument must depend on that assumption, and the "sole question for our decision is whether the tenant can argue "that because the ordinary post and not the registered letter "post was used the notice was not properly served and therefore "was a bad notice. The county court judge appears to have "thought that some assistance was to be derived from a case in "Scotland under a totally different Act, *Department of Agriculture for Scotland* v. *Goodfellow*.[3] A notice had been served "by ordinary post, but the court was there concerned with a "special provision of the Agricultural Holdings (Scotland) Act, "1923, which required written notice to be given either in the "same manner as a notice under the Removal Terms (Scotland) "Act, 1886, or in the form and manner prescribed in the Sheriff "Courts (Scotland) Act, 1907. Rule 113 in the first schedule to "the latter Act provided that removal notices 'may be given' "(1) by a messenger-at-arms, (2) by a sheriff officer, or (3) by "registered letter. It is quite clear that those provisions required "a certain ceremonial service, and if that ceremony had not been "complied with, there had not been service within the requirements of the Act. But section 53 of the Act with which we are "now concerned does not require any ceremonial. It provides "that a notice may be served on the person to whom it is to be "given either personally, or by leaving it for him at his last "known place of abode. It adds, as an alternative, that the "person who has to serve the notice may do so by sending it "through the post in a registered letter. If he did that, no doubt, "he would get the additional advantage of being able easily to "prove that he had served the notice, by producing the postal "receipt, but he can serve the notice personally or by leaving it "at the tenant's last known place of abode. It seems to me "impossible to say that under that section, if you use the post, "you can only do so by the medium of a registered letter, and "that, if you use the ordinary post, and the letter is delivered "to and received by the person to whom the notice is to be given,

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[2] [1942] 1 K.B. 217, 220.

[3] 1931 S.C. 556.

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"you have not complied with the requirements of the Act. In "the result, I think that the county court judge was wrong in "that part of his decision."

It is to be observed from that reasoning that MacKinnon L.J. was apparently treating the act of sending a letter by ordinary post as equivalent to leaving it for the proposed recipient at his last known place of abode; and it appears to me that that, as I read it, being part of the reasoning running through his decision, is binding upon me, and I am bound to interpret section 23 (1) so far as the second mode of service is concerned as being satisfied if the ordinary post is used. It is true that the last known place of abode was not specified on the letter, but the words of MacKinnon L.J. appear to me to be wide enough to cover that, because he says if you use the ordinary post and the letter is delivered to and received by the person to whom the notice is to be given, you have complied with the requirements of the Act. Here, as a result of the direction to the postmaster at Huddersfield given by the tenants themselves, the letter was in fact, to use the words of MacKinnon L.J., left at the tenant's last known place of abode. I am unable to accept the argument on that basis that the failure to specify the correct address is fatal to the landlords. The vital thing is that the letter was in fact delivered. The whole purpose of section 23 is to see that a notice is given and actually received, and that happened in this case.

I would observe in passing that "place of abode" is the equivalent of "place of business," and that that is so appears from *Morecambe and Heysham Corporation* v. *Warwick*.[4] But there is another point which to my mind is fatal to the tenants in this case. On the reasoning of the members of the Court of Appeal in *Tennant* v. *London County Council*[5] I feel constrained to construe section 23 (1) as being permissive so far as the mode of service is concerned. It is perfectly true, as was pointed out by Mr. Holdsworth, that the requirement that the notice, etc. is to be in writing is imperative—"Any notice, request, demand or "other instrument under this Act shall be in writing"; but then when the subsection goes on to deal with service the permissive verb "may" is used, and that is in clear contradistinction to the imperative "shall." I can see no canon of construction which would entitle me to qualify the nature of the verb "may" by anything that has gone before in the subsection. It follows

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[4] (1958) 56 L.G.R. 283; 9 P. & C.R. 307.

[5] (1957) 55 L.G.R. 421.

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that, although there are certain modes set out in the subsection, they are not to be regarded as being exhaustive. It therefore appears to me, apart from the reasoning in *Sharpley* v. *Manby*,[6] that I am entitled to say, without praying in aid the second method, that is, leaving it for him at his last known place of abode, that it is sufficient if the letter is sent to and received by the plaintiffs. That in fact happened, and it matters not to my mind on this particular reasoning that the letter got to Leeds via Huddersfield, because I am now dealing with a method which is ex hypothesi outside the section. Clearly what did in fact happen achieved the clear intention of the legislature, namely, that the notice should be received by the person intended to receive it.

On that ground I find against the tenants on this summons.

Another point was adumbrated, namely, that in the circumstances which I recited earlier in this judgment the tenants must be taken to have waived any invalidity in the service of notice. It is not necessary for me to express any decided view on that matter having regard to the view which I have taken under section 23; but in case the matter should go further and in case it should be of any assistance to the Court of Appeal, I will express the view that, on the facts which I have recited, the tenants must be taken to have waived any invalidity, had there been any invalidity, in the service of notice. I think, for myself, on this part of the case that the reasoning of the Court of Appeal in *Tennant* v. *London County Council*[7] applies.

Therefore, for those reasons, I propose to dismiss this summons with costs.

Order accordingly.

Solicitors: *Ward Bowie & Co. for Joseph Wurzal & Co., Leeds; Simmons & Simmons.*

K. R. A. H.

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[6] [1942] 1 K.B. 217.

[7] 55 L.G.R. 421.

In re STEED'S WILL TRUSTS.

C. A.

1960
Jan. 22,
25, 26.

Lord Evershed M.R.,
Willmer and
Upjohn L.JJ.

[1958 S. No. 1486.]

Trusts — Variation — Act of 1958 *— Protective trust — Opposition by trustees—Variation proposed by sole beneficiary—" Arrangement "— Power of court to override discretion of trustees—Interest of spectral husband in wife's welfare—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

Trusts—Discretion of trustees—Control by court—Variation of trusts under Act of 1958*—Power of court to override trustees.*

By his will, a testator gave and devised certain farm property to his trustees upon trust for sale upon protective trusts, as defined by section 33 of the Trustee Act, 1925, for the benefit of the plaintiff for life, and after her death for such persons as she might by deed or will appoint, and in default of appointment, upon trust for the persons entitled on the distribution of her estate, with a proviso that the plaintiff should have the use and enjoyment of the capital value thereof if she needed it, and that the trustees might apply capital moneys arising on the sale of the farm to or for her benefit provided that they should consider the necessity for retaining sufficient capital to prevent her from ever being without adequate means. The testator also gave to the trustees a sum of £4,000 on trust for the plaintiff on the same protective trusts, and with similar powers of appointment by the plaintiff, and for the use of capital for her benefit, and authorised the trustees to use the legacy for the purpose of providing a residence for her. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

The trustees were about to sell the farm in exercise of the discretionary powers conferred by the will but the plaintiff opposed the sale. She made an application under section 1 of the Variation of Trusts Act, 1958,[1] for approval by the court of an arrangement

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[1] Variation of Trusts Act, 1958, s. 1: " (1) Where property, whether " real or personal, is held on trusts " arising, whether before or after the " passing of this Act, under any will, " settlement or other disposition, the " court may, if it thinks fit, by order " approve on behalf of— . . .

" (*b*) any person (whether ascertained or not) who may become " entitled, directly or indirectly, to an " interest under the trusts as being at " a future date or on the happening " of a future event a person of any " specified description or a member of " any specified class of persons, so " however that this paragraph shall " not include any person who would " be of that description, or a member " of that class, as the case may be, " if the said date had fallen or the " said event had happened at the date " of the application to the court, " or . . .

" (*d*) any person in respect of any " discretionary interest of his under " protective trusts where the interest " of the principal beneficiary has not " failed or determined, any arrangement (by whomsoever proposed, and " whether or not there is any other " person beneficially interested who is " capable of assenting thereto) varying or revoking all or any of the " trusts, . . .

" Provided that except by virtue of

proposed by her varying the trusts so that the trustees would hold the farm and the legacy on trust for her absolutely. The trustees did not consider that the proposal would be for the benefit of the plaintiff and declined to approve it:—

Held, (1) that the duty imposed by section 1 of the Act of 1958 was not confined to inquiring into the effect of a proposed scheme on those on whose behalf approval was sought, but required also consideration on behalf of any person or persons who might have an interest under the discretionary trusts, and whose presence prevented the sole beneficiary from putting an end to the settlement. The proposal had to be looked at as a whole to see whether it was proper to be sanctioned by the court, and the court had to have regard not only to the material benefit of the person who was unable to give his consent because he was not in a position to do so, but to the purpose of the trust. The views of the trustees were relevant though not conclusive (post, pp. 420, 421, 422).

(2) That, applying that test, and having regard particularly to the interest of any husband that the plaintiff might hereafter marry, the court should not approve the proposed variation (post, p. 423).

(3) That the court should not interfere with the exercise of the trustees' discretionary powers in fulfilment of the duty imposed by the will (post, p. 418).

In re Mayo [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440 applied.

Decision of Harman J. [1959] Ch. 354; [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609 affirmed but for different reasons.

APPEAL from Harman J.

By his will, dated August 6, 1954, the testator, Joshua Owen Steed, gave and devised to his trustees, by clause 9 thereof, "Loft Farm Cockfield upon trust to sell the same with power "to postpone such sale for so long as they in their absolute "discretion shall consider desirable and until any sale shall be "effected to hold such property and on sale the proceeds of sale "thereof upon protective trusts as defined by section 33 of the "Trustee Act, 1925, for the benefit of . . . Gladys Louise Sandford "[the plaintiff] during her life And from and after the death of "the said Gladys Louise Sandford Upon trust to hold the said "properties or the proceeds of the sale thereof in trust for such "person or persons as the said Gladys Louise Sandford may by

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"paragraph (*d*) of this subsection the "court shall not approve an arrangement on behalf of any person unless "the carrying out thereof would be "for the benefit of that person.

"(2) In the foregoing subsection "'protective trusts' means the trusts "specified in paragraphs (i) and (ii) "of subsection (1) of section thirty-three of the Trustee Act, 1925, or "any like trusts, 'the principal beneficiary' has the same meaning as "in the said subsection (1) and "'discretionary interest' means an "interest arising under the trust "specified in paragraph (ii) of the said "subsection (1) or any like trust."

"deed revocable or irrevocable or by will or codicil appoint And "in default of appointment upon trust for the persons who may "be entitled in distribution to her estate Provided nevertheless "and I hereby declare that the settlement of this property upon "the said Gladys Louise Sandford is made for the purpose of "providing for her during her life but it is my wish that she shall "have the use and enjoyment of the capital value thereof if she "needs it during her life And I direct that if and when such "property shall be sold my trustees may apply capital moneys "from such sale to or for her benefit at such times and in such "proportions as they may consider to be most to her advantage "and that any portion of the capital may be paid to her as income "annually or at any other periods which my trustees may think "desirable provided that they shall consider the necessity for "retaining sufficient capital to prevent her from being without "adequate means at any time during her life and if they shall "think it desirable in her interest to buy an annuity for that "purpose."

By clause 10, the testator gave a legacy of £4,000 to the trustees to be held on trusts similar to those elaborated in clause 9. He concluded clause 10 as follows: "The amount of this "legacy is intended as a recognition of the interest which I feel "sure the . . . [plaintiff] will take in the welfare" of a named brother.

The testator died on December 13, 1954, and his will was duly proved by the three defendants, the executors and trustees named therein. The plaintiff was then 48 years old, unmarried, and had remained so. She exercised both powers of appointment by deed irrevocably in her own favour.

Loft Farm (which comprised about 50 acres) had been let by the testator to one of the plaintiff's brothers—not being the brother named in clause 10 of the will.

After the testator died the trustees bought for the plaintiff a café in Long Melford for a little under £2,000 out of the capital fund, but that venture was not successful and the plaintiff wanted to be relieved of it and desired the trustees to build a bungalow on the farm so that she could live there.

During the brother's tenancy of the farm the evidence was that he had apparently done considerable work there and it was possible that he had improved it, but that his own financial position was precarious. It was uncertain whether he had in fact paid any rent, though the evidence was that the plaintiff (who, as Lord Evershed M.R. said, would be in effect entitled to receive it under the trusts) had given him receipts. The trustees were also concerned about possible liability for capital expenditure for repairs. They came to the conclusion that the farm was not a desirable asset from the point of view of the trusts which they were under a duty to administer, and that it ought to be sold. They took the best advice that they could get and were informed by qualified experts that the value of the farm, if sold with the tenant in occupation, would not be much above the value for probate of about £1,300. But they eventually succeeded in obtaining an offer of £2,250 on the same basis, which, as Lord Evershed M.R. commented, was, on the evidence, a very good offer indeed.

The trustees were about to proceed when, on May 9, 1958, the plaintiff issued a writ against the trustees seeking to restrain them from giving effect to the sale and, by a summons taken out in the action on May 15, she invoked the equitable jurisdiction of the court to control trustees and to direct them not to sell the farm. Subsequently, the plaintiff was given leave to amend the writ and the summons to ask the court, in pursuance of the powers conferred on it by the Variation of Trusts Act, 1958, to approve an " arrangement " varying the trust put forward by the plaintiff whereby the trustees should stand possessed of the farm and the property, investments and cash representing the legacy upon trust for the plaintiff absolutely. The trustees opposed the proposals, which they did not consider were for the plaintiff's benefit. Harman J. refused to grant the relief sought on the ground that the proposals were not an " arrangement " within section 1[1] of the Variation of Trusts Act, 1958, which referred to an arrangement to which the trustees were a party. The courts had no power to override the discretion of the trustees for it had been properly exercised. The plaintiff appealed.

G. H. Newsom Q.C. and *Eric Griffith* for the plaintiff. The proposed sale is an improvident exercise of the trustees' discretion because if the plaintiff's brother was a bad tenant, as they have alleged, he ought to be turned out of the farm so that it could be sold with vacant possession. Therefore, the plaintiff seeks an injunction. Alternatively, the variation sought would give the plaintiff the absolute reversion and no doubt she would then call for the farm to be transferred to her. She is past the age of child-bearing.

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[1] For footnote see p. 407.

The Act of 1958 is concerned only with cases where at least one of the persons interested is under a disability or is unascertained, for if the class of beneficiaries was closed and all were of full age, *In re Smith*[2] would apply and there would be no need to apply to the court. Under the Act the court has power to supply consent in a proper case for a person or persons whose consent cannot be obtained, that is, in the present case, any after-acquired husband.

[UPJOHN L.J. Does this case come under section 1 (1) (*b*) or (*d*)? Is it possible that if she agreed to forgo the rent, that a forfeiture has already taken place within section 33 of the Trustee Act, 1925?]

There is insufficient evidence of forfeiture and it has not been argued. It is submitted that she could not make a valid arrangement to forgo the rent. Paragraph (*d*) is relied on, though (*b*) and (*d*) overlap. If necessary, a fund could be set aside for the husband.

The proposed variation is an " arrangement " within section 1 of the Act of 1958. The Act does not require that an arrangement must be made between two or more persons, and the judge was mistaken when he said that the trustees had to be a party: compare section 64 (2) of the Settled Land Act, 1925, which contemplates that a tenant for life can effect an " arrangement."

[*L. H. L. Cohen* intervening. It is not sought to support that part of the judgment. It was not submitted in the court below that an " arrangement " within section 1 had to be inter partes. It is further conceded that the court's jurisdiction to restrain trustees in the exercise of their discretion is not dependent on there being a full administration of the estate or trusts.]

As the judge approached the case from the wrong angle it is open to this court to consider the merits of the proposed variation and to see whether this is an " arrangement " which should be approved on behalf of the spectral spouse. The trustees' opposition is only a factor and is not decisive. It is the duty of the trustees to represent and protect absent parties, but according to the evidence these trustees were concerned solely with the interests of the proposer and there is nothing to suggest that they addressed their minds to the benefit of the spectral spouse. It would be in his interest to bring to an end the present unhappy and uncomfortable state of affairs and let the plaintiff look after herself. She is the only person who could be damnified and approval is not required on her behalf.

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[2] [1928] Ch. 915.

Though the trustees may have been acting in good faith in arranging the sale, the court can inquire into it to see whether that is what the justice of the case requires: *Hampden* v. *Buckinghamshire (Earl).*[3] The plaintiff's evidence as to the value of £4,000 has never been challenged. If this was a statutory trust for sale the trustees would be under a duty to consult the beneficiaries. Where one has, as here, only one person concerned, the trustees should act as nearly as possible as if they were executing a statutory trust on behalf of the shadowy spouse. The judge was mistaken in the view that the court had no power to interfere with the exercise of the trustees' discretion unless an administration had been asked for, or at any rate would have been granted if it had been asked for. The court can interfere with a sale in a proper case and can look at the matter broadly. Paragraph (*e*) of R.S.C., Ord. 55, r. 3, must be wider than (*d*). [Reference was made to *In re D'Epinoix's Settlement.*[4]]

L. H. L. Cohen for the defendants, trustees of the will. First, on the application under the Act of 1958 the court has to consider the proposed variation both on behalf of the spectral husband and the plaintiff. She is a protected life tenant and cannot give her consent, either in respect of an interest under section 33 (1) (i) or as a member of the class under subsection (1) (ii). Alternatively, the proposed variation has to be considered against the background of the will as a whole and then from the point of view of the "spectral husband." The trustees of this will are seeking to exercise bona fide the discretion expressly given to them by the will and it is doubtful whether the court should use the Variation of Trusts Act to defeat that. There might be a case for approving a variation if the application had been made some years after the settlement was made or the testator had died and there had been a change of circumstances, but this will was made only four or five months before the testator died and when it was made the plaintiff was already 48, unmarried and without issue. The court might well look at the matter differently if the plaintiff had been a young woman when the money was left to her. The protective trusts were not here imposed for the benefit of issue. Both on the face of the will and on the evidence filed on the part of the defendants it is apparent that the plaintiff was not intended to have the control of the capital.

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[3] [1893] 2 Ch. 531 (C.A.).

[4] [1914] 1 Ch. 890.

[UPJOHN L.J. In practice one looks at the scheme as a whole to see whether it ought to be approved, and only after that stage is passed does the court pass to considering the interests of the individuals on whose behalf it has to be approved.]

That is accepted. R.S.C., Ord. 55, r. 14A (3A), supports the view that the rule-making body thought that it was relevant to the purposes of the Act to see what the testator's intentions were. It is plain that the protective trusts were imposed because the plaintiff is generous and certain members of her family are improvident. The onus is on the plaintiff to show all the circumstances which are relevant to the scheme as a whole, and she has failed to do that. The Act is not intended to be used as an instrument for overriding the plain intention of the testator or the proper exercise by the trustees of the discretion which has been conferred on them, particularly as a trust for sale, rather than a mere discretion, has been imposed. The onus of showing that the trust or discretion has been wrongly exercised is on the plaintiff. The trustees have not surrendered their discretion.

[LORD EVERSHED M.R. If the testator wanted to protect the plaintiff, it is strange that he gave her the power of appointment.]

The testator was inartistic in the use of language, but his intention was plain that if she was to get the capital in her lifetime it was to be in the form of proceeds of sale. That was made clear by the direction to buy an annuity. The plaintiff has not produced any proof that the sale is improvident, and, although the farm might fetch a higher price if sold with vacant possession, it is by no means clear that the trustees could if they wished turn out the plaintiff's brother. It would be difficult to bring proceedings on the ground of non-payment of rent in the teeth of receipts signed by the plaintiff, and none of the other statutory grounds for obtaining possession provided under the Agricultural Holdings Act is applicable.

Secondly, as to the claim for an injunction, the court will not interfere with or seek to control the exercise of an absolute discretion except where it is shown that the trustees are not acting bona fide or have wilfully refused to act. Where the discretion is coupled with a duty the court will interfere to enforce the performance of the duty in a proper case, but not to prevent the performance of a duty or trust imposed by the testator. Where there is an express trust for sale, and the trustees want to exercise the power of sale, it is contrary to the whole concept of the law of trusts for the court to interfere and say that there should be no sale or conversion. [Reference was made to *In re Mayo*[5] and *In re Hylton's (Lord) Settlement.*[6]] *In re Buchanan-Wollaston's Conveyance*[7] is distinguishable, for there there was an express contract that the property should not be sold except with the unanimous consent of all the joint tenants. [Reference was also made to *Gisborne* v. *Gisborne*[8] and *Camden (Marquis)* v. *Murray.*[9]]

[Counsel was stopped on this point.]

Reverting to the Act of 1958, the judges of the Chancery Division of the High Court have considered arrangements for variation first from the general point of view, and only if they have been satisfied that a scheme is one which should be approved have they gone on to see who are the persons on whose behalf the scheme must be approved. If there had been any evidence of a forfeiture having occurred, this would be a class (*b*) case. The plaintiff would then have to make out a case for the benefit of her future husband. In any event the court has a discretion whether to approve a scheme. The judge was exercising the discretion properly in refusing to approve this arrangement. There are indications here which show a strong case for not breaking the trust. This will was made after *Chapman* v. *Chapman*[10] and before the Act of 1958. At that time an application such as this could not have been made. [Reference was also made to the note, at p. 1489 of the Annual Practice for 1960, to R.S.C., Ord. 55, r. 3.]

Newsom Q.C. in reply. In the usual case the court is asked to approve on behalf of unborn persons or infants, and this is probably the only contested case that there has ever been. When this will was made *Chapman* v. *Chapman*[10] had just been decided. The powers of the court under the subsequent Act of 1958 are by section 1 defined and confined to giving approval on behalf of persons unascertained or not sui juris. It has been suggested that the Chancery Division judges have in practice looked at proposed variations as a whole, which would be a sensible approach to every case other than this contested case. The conflict is not between beneficiaries but between the sole beneficiary, other than the spectral spouse, and the trustees, and in such a case the court's function is confined to considering whether, in the judicial exercise of its discretion, it should give approval on behalf of the spectral spouse. It is no part of the court's function to give approval on behalf of the trustees or of the proposer; they do not come in except that their views are necessarily before the court. The circumstances of this case have changed radically since the will was made. The reasons for introducing the spectral husband were more cogent than they are now, for at that time the plaintiff was not legally past the age of child-bearing. She is now 54 and the class of discretionary objects is now reduced to the spectral husband. The plaintiff might now be thought entitled to ruin herself in her own way. The court should not speculate what the testator would have said in the present circumstances. It is odd, if the court considers that she ought to be permanently controlled, that she should have been given power to appoint by deed. She could sell her reversionary interest immediately.

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[5] [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.

[6] [1954] 1 W.L.R. 1055; [1954] 2 All E.R. 647 (C.A.).

[7] [1939] Ch. 738; 55 T.L.R. 604; [1939] 2 All E.R. 302 (C.A.).

[8] (1877) 2 App.Cas. 300 (H.L.).

[9] (1880) 16 Ch.D. 161.

[10] [1953] Ch. 218; [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103 (C.A.).

LORD EVERSHED M.R. This is in more ways than one, including matters of procedure, a somewhat unusual case, as Mr. Newsom observed. It is also in many respects an unhappy case, and I cannot refrain from expressing my own sympathy for the plaintiff on the one side, and for the three defendant trustees on the other.

I propose in this judgment to forbear from entering, except where absolutely necessary, into matters of fact which might only serve to rub salt into existing wounds. Suffice it to say that the plaintiff was one who served loyally and most skilfully for a long period of time the testator and the testator's wife. In consideration for those services the testator included in his will provisions for her benefit, contained in clauses 9 and 10.

It is, I think, quite plain on the evidence that the testator, while anxious to show his gratitude to the plaintiff, was no less anxious she should be well provided for and not exposed to the temptation, which he thought was real, of being, to use a common phrase, sponged upon by one of her brothers. I fully realise that the plaintiff's natural affection for that brother is not a matter which one can in any sense condemn. Blood is, after all, thicker than water, and the happiness of the plaintiff, according to her own view at any rate, is very much linked up with the association with that brother and the brother's daughter and wife.

On the other side, however, are these trustees upon whom has been placed an obligation, a duty to give effect to the intentions of the man who provided the money. Mr. Newsom pointed out (and it is an unfortunate aspect of this case) that during the years since the testator died, that is, a little over five years, relations between the plaintiff and these trustees have become somewhat strained because the trustees took a view which the plaintiff thought unkind to her.

The duty of a trustee is not always an easy one. Indeed, I may recall the famous saying of Professor Maitland: "Equity "evolved one novel and fertile institution, namely, the trust," the effects of which have become internationally famous. Though trustees may sometimes take the easy line, on other occasions trustees may feel that they must try to do, to the best of their ability, the duty cast upon them, however distasteful.

I will now just state the procedural anomaly in this case. In the month of May, 1958, the plaintiff issued a writ against the trustees in which she sought to restrain them from giving effect to a sale of a certain farm which was part of the property, the subject of the trusts I have mentioned. The farm is known as Loft Farm, Cockfield. In extent, we were informed, it was 50 acres, or perhaps a little over; but since the proceedings were started an added trouble has arisen. The farmhouse appears to have been substantially destroyed by fire. We understand, however, that to nothing with which we are concerned is that really relevant.

The reason for the issue of the writ was that the trustees in the exercise of their powers and discretions, to which I will allude more fully in a moment, were on the point of giving effect to a bargain which they had made for the sale of the farm. I have used rather loose phrases deliberately because there was a question, and there is a question, whether the trustees are in law bound in any case to the proposing purchaser. It will suffice for me to say, because Mr. Newsom conceded so much, that it may be that if the proposing purchaser took the appropriate steps he could bring proceedings in respect of the bargain if the trustees did not fulfil it; but he has not done so. He seems to have been a most amiable purchaser.

The proceedings having started, a summons was then taken out in the action in which the equitable jurisdiction of the court to control trustees was invoked. Later still, when the matter came before the court, the summons was by leave and by consent amended, so that it now is also entitled "In the matter of the "Variation of Trusts Act, 1958," in order to invite the court to exercise the powers under that Act to approve the "arrangement" (according to the word used in the section) which the plaintiff has put forward. It is by way of appeal from the judge's refusal to grant any relief on that summons that the present matter now has come before the court. Nothing now turns upon the procedural aspect of the matter, as I conceive, but I have thought it right to refer to it. [His Lordship read clause 9 of the will, referred to clause 10 and stated the facts. He went on:]

Mr. Newsom put forward an argument that the proposed sale was an improvident exercise of the trustees' discretion on any footing. He said that if the trustees wanted to get rid of the farm, the thing for them to do was to get rid of the tenant and then sell with vacant possession, when they would get very much more. There is no reliable evidence that they would get very much more if they took that step, and we all know that to get rid of a sitting tenant in these days, particularly where the evidence shows what he has done to his farm, would be no easy matter at all, nor does it come very naturally so to suggest from the advocate for the plaintiff. I cannot, I am afraid, pay much regard to that view.

I think that the matter—and I am not so far saying anything about the Variation of Trusts Act jurisdiction—is really capable of being put in the smallest compass. In what circumstances are the trustees to be overridden in exercising their discretion as they propose by a sale, notwithstanding the very firm opposition of the plaintiff? Her interest in the property is not now confined to that of a life interest, for about the time when these proceedings started she exercised her power under clause 9 irrevocably to appoint to herself, so that upon her death her estate becomes entitled to the corpus of the trust property.

She is at the moment still unmarried, so that there is no other living person who can be ascertained, at any rate, who has any interest in the property. I put it in that form because, of course, there may be some man to whom later the plaintiff will become married. There may be more than one. So long as the protective trusts survive and are not displaced by an exercise of the jurisdiction under the Act of 1958, the plaintiff is incapable of putting an end to the trusts and requiring that the property be handed over to her.

So, I repeat, the problem seems to be: ought the trustees to exercise their discretion as they propose by a sale, or should they rather succumb to the plaintiff's wishes, she being the person who has such an overwhelmingly preponderant interest in the trust property? I put it in that form. It may well be that other trustees might have been, as I earlier indicated, submissive and said: "Well, in all the circumstances, money, as the plaintiff "said, is not everything, and we will let the matter stand as it is. "If the plaintiff chooses to part with her money, that is her "affair," but they have not taken that line. The line they have taken has been a deliberate exercise of the discretion and a deliberate discharge of the duty. There is no ground whatever for suggesting they have done any wrong thing, as that word is ordinarily understood. How then can the court now be asked to override the discretion which the testator conferred upon them, particularly in the circumstances which, as is proved clearly by the evidence, were in his mind, and for the purposes of preventing which the trusts were imposed?

The judge in the course of his judgment[1] may perhaps have based himself on the view that the court could not, that is to say, had no power to, interfere with the trustees' exercise of their discretion unless the case was one in which a decree for administration or execution of the trusts, if not asked for, at any rate would have been granted on the material before the court if it had been asked for.

Mr. Cohen, for the trustees, has not founded himself on so broad a proposition. What he has said is that in the absence, of course, of mala fides or some other special circumstances which would show at least grave misdirection of themselves by the trustees, the court will not interfere, particularly in a case where there is an express trust for sale, and where the trusts, as declared, clearly impose, and are intended to impose, a duty in the discharge of which, as the evidence shows, the trustees have reached their conclusion.

Mr. Cohen cited the language of Simonds J. in *In re Mayo*,[2] which, I think, supports the general proposition as Mr. Cohen put it. I, therefore, would not desire to base myself upon the suggestion which appears to underlie the language of the judge in *In re Steed's Will Trusts*.[3] On the other hand, I am quite satisfied, upon the general principles which are applicable to these matters, that this court ought not to interfere, and will not interfere here, with the exercise of the trustees' discretion. Why, after all, one may ask, when the testator who has given this bounty has made plain what his purpose is, if the trustees have established they have done their utmost to give effect to the duty which is imposed upon them, should the court disregard the testator and overrule the trustees out of a natural sympathy for the plaintiff? I think the answer to that is, there is no reason whatever. That is all I propose to say upon that part of the case.

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[1] [1959] Ch. 354, 360; [1959] 2 W.L.R. 470; [1959] 1 All E.R. 609.

[2] [1943] Ch. 302; 59 T.L.R. 395; [1943] 2 All E.R. 440.

[3] [1959] Ch. 354, 360.

I now come to what has caused me greater difficulty, namely, the effect of the Variation of Trusts Act, 1958. I do not take time to read the whole of section 1 or the subsections, but the relevant language is that where property is held on trusts, the court " may, " if it thinks fit, by order approve on behalf of "—and there are then set out in four lettered paragraphs the classes of person, which include infants and unborn persons. Under paragraph (*d*) is included: " any person in respect of any discretionary interest " of his under protective trusts where the interest of the principal " beneficiary has not failed or determined." The subsection continues: " any arrangement (by whomsoever proposed, and whether " or not there is any other person beneficially interested who is " capable of assenting thereto) varying or revoking all or any of " the trusts." There follows a proviso: " Provided that except " by virtue of paragraph (*d*) of this subsection the court shall not " approve an arrangement on behalf of any person unless the " carrying out thereof would be for the benefit of that person."

There was some discussion of the use of the word " arrangement." Again, if I may respectfully say so, the language used by the judge seems to indicate that an arrangement must be in some sense inter partes, some kind of scheme which two or more people have worked out. I do not myself accept that. I think that the word " arrangement " is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts.

In the present case, the proposed variation (that is, the " arrangement ") which the plaintiff puts forward may be most briefly and accurately stated as involving this: in clause 9 of the will the words: " upon protective trusts as defined by section 33 " of the Trustee Act, 1925," should be omitted, and similarly in the next clause the word " protective " should be omitted. If those words were omitted, the result would be that the plaintiff would become absolutely entitled to the property, because she would then be the life tenant, having appointed by irrevocable deed to herself the reversion; and that is what she seeks.

The trustees have taken the view that it is not an arrangement which, having regard to their conception of their duties and the

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wishes of their testator, they should approve. For my part, I do not think that approval on behalf of the trustees is the court's function in this case, though the court in exercising its general discretion will certainly pay regard to what the trustees say and the grounds for their saying it. Nor can I see, if this was the judge's view, that the court is called upon by the language of this section to approve the arrangement or proposal on behalf of the proposer; that is to say, whether they think she was wise or unwise to put her idea forward.

The duty of the court, as I read the section on the facts of this case, is that they must approve it on behalf of the only person or persons who might have an interest under the discretionary trusts and whose presence under the trusts now prevents the plaintiff saying that she can put an end to the settlement.

Having regard to the plaintiff's age, no doubt it is true to say that she will not and cannot now have children, but she might marry, and marry more than once. She says, with some reason, that having lived for 53 years unmarried she does not feel in the least likely to marry now. That may well be right, though many have said that before and subsequent events have proved them wrong. That, however, is neither here nor there. There does exist a discretionary trust, and a future husband of the plaintiff's is a person interested under those trusts, on whose behalf the court must now approve the proposal.

Having regard to what has happened between the plaintiff and her brother, it is possible that, strictly speaking, there has been a forfeiture, and if so, the future husband or husbands would be within paragraph (*b*) of the subsection, but if not, he would be within paragraph (*d*). Again, I think that does not, for present purposes, matter.

I repeat that the duty of the court is now to consider whether in the exercise of its discretion, which is framed in the widest possible language, it should approve the arrangement on behalf of what has been described in argument as the spectral spouse of the plaintiff. In doing that, what must the court consider? Not, I conceive, merely the material benefit or detriment of such spouse. Certainly not if he is to be regarded as being a person under paragraph (*d*), though if he is to be regarded as falling under paragraph (*b*) it is expressly enjoined that the court shall not approve the arrangement unless it is for his benefit.

As I have said, I do not so read this Act as to mean that the court's duty in the exercise of this very wide and, indeed, revolutionary discretion is confined to saying: "Would it really "much harm this spectral spouse if we approve the proposal?" Bearing in mind, of course, the admitted possibility that the spouse might cease to be spectral and become a reality, I think what the court is bound to do is to see whether, looked at on behalf of the person indicated, it approves the arrangement. It is the arrangement which has to be approved, not just the limited interest of the person on whose behalf the court's duty is to consider it.

If that is right, it then follows that the court must regard the proposal as a whole, and so regarding it, then ask itself whether in the exercise of its jurisdiction it should approve that proposal on behalf of the person who cannot give a consent, because he is not in a position to do so. If that is a right premise, then it follows that the court is bound to look at the scheme as a whole, and when it does so, to consider, as surely it must, what really was the intention of the benefactor. That such is a proper approach is at least supported by the provisions of R.S.C., Ord. 55, r. 14A (3A), which provides that in the case of an application under this Act, where there is a living settlor the living settlor is to be a party before the court. That rule seems to me to reinforce what I conceive to underly this provision, namely, that the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other relevant evidence available.

Having so formulated the duty, I have, for my part, come to the conclusion that it would not be right for the court in the exercise of its discretion to approve this variation or arrangement. I am not uninfluenced in coming to that conclusion by any means by the circumstance that the judge obviously did not think it was a proposal which should be approved, though it is quite true that for reasons which I have indicated it may be said he was looking at it and basing his jurisdiction upon an interpretation of the section which I have not been altogether able to share, namely, it was his duty to approve it on behalf of the proposer, the plaintiff, and also that the scheme must be regarded as intended to be in some sense inter partes and, therefore, that he had to approve it on behalf of the trustees.

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Disagreeing, if that is a fair view of his judgment, with that premise, nevertheless it is quite clear, I think, that the judge was by no means unsympathetic to the feelings and views of the plaintiff, but, on the other hand, was no less clear in his mind that the arrangement was one which so cut at the root of the testator's wishes and intentions that it was not one which the court should approve.

After all, if the court is asked to approve this proposal on behalf of a spectral spouse (if I may revert to that phrase), it must ask, I take it, why is the spectral spouse there at all under the trust? If one asks that question, nearly everything else, as it seems to me, follows. There is no doubt why the spectral spouse is there. It was part of the testator's scheme, made as I think manifest by the language which I have read from the clauses in the will, that it was the intention and the desire of the testator that this trust should be available for the plaintiff so that she would have proper provision made for her throughout her life, and would not be exposed to the risk that she might, if she had been handed the money, part with it in favour of another individual about whom the testator felt apprehension, which apprehension is plainly shared by the trustees.

For those reasons, therefore, I also conclude adversely to the plaintiff that we should not exercise jurisdiction under the Act of 1958 to approve the arrangement which has been put forward, and which I have tried to define. That is the end of the case. I only repeat the sympathy I have felt in a distressing matter of this kind, both with the plaintiff and with the trustees, whose difficulties in discharging their duty are obvious. I should like to express the hope that perhaps time, the healer, will do much to put an end to these troubles.

WILLMER L.J. I entirely agree, and I do not find it necessary to add any words of my own.

UPJOHN L.J. I also agree. When considering applications under the Variation of Trusts Act, I agree that this court is not confined to the narrow duty of inquiring into the effect of a proposed scheme upon those on whose behalf approval by the court is sought. The court must be satisfied that the scheme, looked at as a whole, is proper to be sanctioned by the court. Upon that matter, the views of the trustees are entitled to respect but are not conclusive.

In the circumstances, and for the reasons stated by my Lord. I agree that this is not a scheme that is proper to be approved by the court.

Appeal dismissed. No order as to plaintiff's costs, except an order under Schedule III to the Legal Aid and Advice Act, 1949, for taxation of her costs as between solicitor and client. Trustees' costs out of the corpus.

Solicitors: *Field, Roscoe & Co. for Pretty, Dawson & Butters, Ipswich; Sharpe, Pritchard & Co. for Barr & Co., Cambridge.*

E. D.

GROSVENOR PLACE ESTATES LTD. *v.* ROBERTS (INSPECTOR OF TAXES).

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Feb. 11.

Danckwerts J.

Revenue—Income tax—Deduction at source—Failure of payer to deduct tax—Whether recipient of payment chargeable—Rent—Schedule D—Long lease—Statutory duty of tenant to deduct tax—Payment of rents without deduction—Whether landlord properly assessed to tax —Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 148, 170 (1) (2), 177 (1) (2).

The tenants of premises under a "long lease" within section 177 of the Income Tax Act, 1952, made to the landlords, without deduction of tax, payments of rent chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Act and subject to deduction of tax under section 170.[1] On an appeal by the landlords

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[1] Income Tax Act, 1952, s. 148: "Tax under Schedule D shall be "charged on and paid by the persons "receiving or entitled to the income "in respect of which tax under that "Schedule is in this Act directed to "be charged."

S. 169: "(1) Where any yearly "interest of money, annuity or other "annual payment is payable wholly "out of profits or gains brought into "charge to tax—(*a*) no assessment "shall be made on the person entitled "to the interest, annuity or annual "payment . . . (3) Where—(*a*) any "royalty or other sum paid in respect "of the user of a patent; or (*b*) any "rent, royalty or other payment which, "under any of the provisions of this "Act, is declared to be subject to "deduction of tax under this Chapter "as if it were a royalty or other sum "paid in respect of the user of a "patent, is paid wholly out of profits "or gains brought into charge to tax, "the person making the payment shall "be entitled on making the payment "to deduct and retain out of it a sum from a decision of the special commissioners affirming an assessment on them in respect of the payments of rent:—

Held, that the assessments had been properly made on the landlords as the recipients of the rents. Although an assessment should have been made on the tenants and not on the landlords, sections 169 and 170 of the Act of 1952 were part of the administrative and not of the charging provisions, while under section 148 the owner of a sum of untaxed income was directly assessable to tax thereon so that the tax might be recovered from the landlords as recipients of payments, notwithstanding that the maker of them might be liable for it.

Glamorgan Quarter Sessions v. *Wilson* [1910] 1 K.B. 725; 26 T.L.R. 351; and obiter dicta of Upjohn J. in *Stokes* v. *Bennett* [1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313 applied.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

A company, Grosvenor Place Estates Ltd., appealed to the special commissioners against assessments for the years 1955–56 and 1956–57 under Schedule D of the Income Tax Act, 1952, in respect of payments of rent received under an underlease granted by the company of premises known as Hobart House.

The following facts were proved or admitted before the commissioners:

The National Coal Board were tenants of Hobart House under an underlease for 81 years less four days granted from March 25, 1955, by the company at an annual rent of £96,177. That underlease was a " long lease " within section 177 of the

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" representing the amount of the tax " thereon at the standard rate for the " year in which the amount payable " becomes due."

S. 170: " (1) Where—(*a*) any " interest of money, annuity or other " annual payment charged with tax " under Schedule D; or (*b*) any " royalty or other sum paid in respect " of the user of a patent; or (*c*) any " rent, royalty or other payment " which, under any of the provisions " of this Act, is declared to be subject " to deduction of tax under this Chapter as if it were a royalty or other " sum paid in respect of the user of " a patent is not payable or not " wholly payable out of profits or " gains brought into charge, the person by or through whom any payment thereof is made shall, on " making the payment, deduct out of " it a sum representing the amount " of the tax thereon at the standard " rate in force at the time of the " payment. (2) Where any such payment as aforesaid is made by or " through any person, that person " shall forthwith deliver to the Commissioners of Inland Revenue, for " the use of the Special Commissioners, an account of the payment, " or of so much thereof as is not " made out of profits or gains brought " into charge, and of the tax deducted " out of the payment or out of that " part thereof, and the Special Commissioners shall assess and charge " the payment for which an account " is so delivered on that person."

Income Tax Act, 1952. The board made the following payments of rent without deduction of tax to the company: quarter ended June 25, 1955, £24,044 5s.; quarter ended September 29, 1955, £24,044 5s.; quarter ended December 25, 1955, £24,044 5s.; quarter ended March 29, 1956, £24,044 5s.; total, £96,177. Quarter ended June 24, 1956, £24,044 5s.; quarter ended September 29, 1956, £24,044 5s.; total £48,088 10s. Those payments of rent were chargeable to tax in accordance with section 177 under Case VI of Schedule D to the Income Tax Act, 1952, and were subject to deduction of tax under either section 169 or section 170 of that Act.

That rent was not paid out of profits and gains of the National Coal Board brought into charge to tax and, accordingly, section 169 of the Act of 1952 did not apply to them. The payments of rent did fall under the provisions of section 170, under which the board should have deducted tax on payment and delivered an account of the payments to the Inland Revenue Commissioners for the use of the special commissioners, who, in the words of the section, "shall assess and charge the payment for which an "account is so delivered on that person," i.e., the person making the payment. The board, as stated above, omitted to deduct tax on payment.

It was admitted by the Crown that the Inland Revenue Commissioners were informed of the payments made, but in what form that information was given was not proved or admitted. There was no evidence that an assessment had been made on the board as the person paying the rents in accordance with the provisions of section 170 and much evidence to the contrary, and the special commissioners drew the inference that none had been made. The special commissioners were informed by counsel for the Crown, in reply to an inquiry by them, that it was not considered obligatory on the assessing special commissioners to make an assessment on the person making the payment, where that payment had been received by the payees in full without deduction of tax: it was considered open to the Revenue, in the existing state of the law, to make an assessment on the recipient in such circumstances, which had been done, and to make an assessment also on the board would create a double assessment of the same sum.

It was contended on behalf of the company that it was obligatory on the assessing special commissioners under the provisions of section 170 to assess the persons making the payment, that it

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must be assumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that, accordingly, an assessment could not be made on the company as payee.

It was contended on behalf of the Crown that the company, having received the rents in full without deduction of tax, was directly assessable.

The special commissioners held that they were bound by the decision in *Glamorgan Quarter Sessions* v. *Wilson*,[2] and they, accordingly, dismissed the appeal and confirmed the assessments. They did not feel it incumbent on them, in the view that they took of the matter, to express any opinion on the apparent failure of the assessing special commissioners to assess the board, although they were glad to have had an explanation of the attitude adopted by them in such cases.

The company appealed, the question of law for the decision of the court being whether, on the facts admitted or proved, the commissioners' decision was correct in law.

F. Heyworth Talbot Q.C. and *C. N. Beattie* for the company. The provision for the payment of tax by deducting and accounting to the Inland Revenue dates back to the Customs and Inland Revenue Act, 1888: see section 24 (3). Only long afterwards was it found that, from the Inland Revenue's standpoint, there was a defect in it. It was found, on a company's going into liquidation, the tax, being merely a debt to the Queen and not an assessed tax, did not get the advantage of priority which the Companies Acts and the Bankruptcy Act gave to assessed taxes. The requisite alteration in the law was made by section 26 of the Finance Act, 1927 (see now section 170 of the Income Tax Act, 1952).

Section 170 (2) of the Income Tax Act, 1952, is both peremptory and mandatory. First, in the case of payment under section 170, it is mandatory on the person by or through whom it is made to deduct the tax; secondly—and, in this case, more important—it is mandatory to render an account; and, further, it is mandatory that the special commissioners "shall assess and charge the "payment for which an account is so delivered on that person." It must follow that the sole provision for assessment is on the person who pays, and it is wholly his own fault if he does not carry out what he is peremptorily directed to do—to deduct the tax; he still has to pay it: see *Lord Advocate* v. *Magistrates of Edinburgh*.[3] True, in *Stokes* v. *Bennett*,[4] Upjohn J. said that in his judgment the Finance Act, 1927, "only improved the "machinery, but was not intended to alter any principle of collec-"tion," and that in his view the recipient of a sum of untaxed income was liable to direct assessment. Those views, however, are obiter and not binding on the court, because Upjohn J. decided that in the case before him the payment was not made out of untaxed income. Nor is the court bound by *Glamorgan Quarter Sessions* v. *Wilson*,[5] in which Bray J. decided that, notwithstanding any liability of the persons who paid interest to pay the tax on it, the persons who received it might also be charged and the tax recovered from them. He said that there was no inconsistency there, and that all that section 24 (3) of the Act of 1888 had done was to give the Crown a further remedy. Section 170 of the Income Tax Act, 1952, however, makes that decision out of date. By virtue of section 170 (2) the commissioners must assess and charge the payment for which an account is delivered, for the word used is "shall"; and by virtue of subsection (2), where, as here, no account has been delivered, they may make the best assessment they can. In fact they have not done so. It is irrelevant that the National Coal Board paid the rent without deducting tax. Quite plainly, on the law as it stands, the assessment to tax should have been made on the board and not on the company: see also section 148 of the Act of 1952.

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[2] [1910] 1 K.B. 725; 26 T.L.R. 351.

Finally, it is to be observed that, under section 36 of the Income Tax Act, 1952, "Statements of profits or gains under "Schedule D shall, unless an assessment thereon is required to "be made by the special commissioners, be laid before the addi-"tional commissioners. . . ." No statement was laid before them in the present case, but in fact section 170 (2) requires that the person making the payment "shall forthwith deliver . . . "for the use of the special commissioners, an account of the "payment . . . and of the tax deducted out of the payment . . . "and the special commissioners shall assess and charge the "payment . . . on that person." The result of that is that the additional commissioners had no power to make these assessments.

F. N. Bucher Q.C. and *Alan S. Orr* for the Crown. True, section 170 (2) may be said to "require" that the special commissioners should make the assessment, since the word "shall" is used. Section 36, therefore, may well give the impression at first sight that the additional commissioners had no power to make the assessments. Section 38, however, provides: "A "person chargeable under Schedule D may require that all proceedings in order to an assessment upon him under that schedule "shall be taken before the special commissioners, instead of "before the additional commissioners, and in that case shall "deliver a notice of his request, together with the statement of "his profits or gains, to the surveyor of the district"; and the words in section 36, "unless an assessment thereon is required "to be made by the special commissioners," mean that the requirement is to be made by the taxpayer, not that it is statutory; and even if section 170 (2) is providing that an assessment on the person paying shall be made by the special commissioners, it need not follow that the additional commissioners cannot assess the recipient. The court should here apply *Glamorgan Quarter Sessions* v. *Wilson* [5] and Upjohn J.'s dicta in *Stokes* v. *Bennett*.[6] The additional commissioners had full power to make these assessments, which should stand.

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[3] 1905 S.C. 972.

[4] [1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313.

[5] [1910] 1 K.B. 725.

DANCKWERTS J. This is an appeal from a decision of the Special Commissioners of Income Tax which raises a point of considerable interest, as it seems to me. The facts of the case are comparatively simple. The National Coal Board hold a lease from the company for a term of 81 years from March 25, 1955, at an annual rent of £96,177; the rent is paid quarterly, each quarter's instalment amounting to £24,044 5s., and it has been paid by the National Coal Board in the period to which the assessments relate without any deduction of income tax.

It is necessary, first of all, to refer to the provisions of the Acts which appear to be relevant before the point which arises can be appreciated. The first is section 177 of the Income Tax Act, 1952, which provides: "(1) this section applies to the "following payments, that is to say—(*a*) rents under long "leases. . . ." It is unnecessary to read (*b*) because this is plainly a case of a rent under a long lease as defined in the Act, that is to say, putting it shortly, a lease for more than 50 years. Then subsection (2) provides: "Any payment to which this section "applies shall, so far as it does not fall under any other Case of "Schedule D, be charged with tax under Case VI of Schedule D "and be subject to deduction of tax under Chapter I of this Part

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[5] [1910] 1 K.B. 725.

[6] [1953] Ch. 566.

"of this Act as if it were a royalty or other sum paid in respect "of the user of a patent." It is an extraordinarily roundabout way of saying it when dealing with simple things like the payment of rent, but there it is.

The sections, which really are the administrative sections which relate to this matter, are sections 169 and 170. Section 169, which actually does not apply, provides: "(1) Where any yearly "interest of money, annuity or other annual payment is payable "wholly out of profits or gains brought into charge to tax—(*a*) no "assessment shall be made on the person entitled to the interest, "annuity or annual payment. . . ." Then there are some further provisions which I need not read, because the material subsection is subsection (3), which provides: "Where—(*a*) any royalty or "other sum paid in respect of the user of a patent; or (*b*) any "rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax "under this Chapter as if it were a royalty or other sum paid in "respect of the user of a patent, is paid wholly out of profits or "gains brought into charge to tax, the person making the payment shall be entitled on making the payment to deduct and "retain out of it a sum representing the amount of the tax "thereon at the standard rate for the year in which the amount "payable becomes due." It is necessary to read that, because that is the provision which is brought in by reference by virtue of section 177; but, in fact, in the present case the tax is not paid "out of profits or gains brought into charge to tax," so that the whole of this provision is not in fact applicable.

Section 170 is the section which does apply, and it provides: "(1) Where—(*a*) any interest of money, annuity or other annual "payment charged with tax under Schedule D; or (*b*) any royalty "or other sum paid in respect of the user of a patent; or (*c*) any "rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction "of tax under this Chapter as if it were a royalty or other sum "paid in respect of the user of a patent"—and, that, of course, brings in the provision in section 177 again—"is not payable or "not wholly payable out of profits or gains brought into charge, "the person by or through whom any payment thereof is made "shall on making the payment, deduct out of it a sum representing the amount of the tax thereon at the standard rate in force "at the time of the payment." Then comes the important subsection (2): "Where any such payment as aforesaid is made by "or through any person, that person shall forthwith deliver to the "Commissioners of Inland Revenue, for the use of the Special "Commissioners, an account of the payment, or of so much "thereof as is not made out of profits or gains brought into "charge, and of the tax deducted out of the payment or out of "that part thereof, and the Special Commissioners shall assess "and charge the payment for which an account is so delivered "on that person."

In this case the National Coal Board, for some reason (I do not know why), omitted to deduct the amount of tax in making the payments of rent under its lease to the company and, though they may have informed the commissioners of the payments which had been made, they did not, so far as I can tell from the case, deliver any account; and it is plain, as is now admitted, that the special commissioners did not assess or charge the payments in any way on the board. No assessment in respect of the present matters has been made on the National Coal Board. Instead of that, the additional commissioners, who, of course, are a different body from the special commissioners in the administration of these complicated Acts, have made assessments in respect of the rent on the recipients, that is to say, on the company, and it is claimed on behalf of the company that the assessments were not properly made, that there was no power to assess them under the provisions of the Income Tax Acts in respect of these rents at all. That contention has been rejected by the special commissioners and, accordingly, the appeal has been brought.

Mr. Heyworth Talbot, in his interesting and instructive argument, has pointed out that this provision for the payment of tax by deduction and accounting to the Inland Revenue dates back to the Customs and Inland Revenue Act, 1888, s. 24 (3). That subsection provides: "Upon payment of any interest of money "or annuities charged with income tax under Schedule D, and "not payable, or not wholly payable, out of profits or gains "brought into charge to such tax, the person by or through whom "such interest or annuities shall be paid shall deduct thereout "the rate of income tax in force at the time of such payment, and "shall forthwith render an account to the Commissioners of "Inland Revenue of the amount so deducted, or of the amount "deducted out of so much of the interest or annuities as is not "paid out of profits or gains brought into charge, as the case "may be; and such amount shall be a debt from such person to "Her Majesty, and recoverable as such accordingly." That was the provision contained in the Act of 1888, and it was not until many years afterwards that it was discovered that there was a defect in it from the point of view of the Inland Revenue because it was discovered, in the case of a company which went into liquidation, that, as the tax was merely a debt to Her Majesty and not an assessed tax, it did not gain the advantage of priority which is given under the provisions of Company Acts and the Bankruptcy Act to assessed taxes. Accordingly, this law was altered by section 26 of the Finance Act, 1927, which is in the form in which section 170 of the Income Tax Act, 1952, is at the present day.

It is contended on behalf of the company that there is no power to make any assessments on the recipients of the rents in the present case, because subsection (2) of section 170 of the Act of 1952 is in peremptory and mandatory form: where the payment is made as described in section 170, first of all the person by or through whom the payment is made is under a mandatory obligation, it is said, to deduct the tax; and secondly—and this is more important for the purpose of the present case—there is a mandatory requirement to render an account; and further, it is mandatory that the special commissioners "shall assess and "charge the payment for which an account is so delivered on "that person." Therefore it is said that the only provision for assessment is one on the person who pays; and, of course, if the person who pays does not deduct, he still has to pay the tax. After all, it is his own fault that he has not carried out what the section peremptorily directed him to do. That argument is one which appeals to me very much, if I am not required by authority to take a different view. There may be a possible answer to it on the terms of the statute, but I will refer to that presently.

It is clear from *Lord Advocate* v. *Magistrates of Edinburgh*,[1] decided long before the Finance Act, 1927, that a taxpayer who makes payments may be liable to the Crown for tax, although he had failed to deduct the amount from the interest which was payable by him—in that case it was the Corporation of Edinburgh. On the other hand, in *Glamorgan Quarter Sessions* v. *Wilson*,[2] Bray J., in spite of the points which have been raised in this case being strenuously argued before him, decided that, although the persons who paid might be liable, the recipients might still be charged and the tax recovered from the recipients. He said[3]:

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[1] 1905 S.C. 972.

[2] [1910] 1 K.B. 725; 26 T.L.R. 351.

[3] [1910] 1 K.B. 725, 735.

"The other ground is that, inasmuch as section 24 (3) of the "Customs and Inland Revenue Act, 1888, makes it the duty of "the person who pays the interest to deduct the amount of the "income tax from the interest which he pays and to account for "it to the Commissioners of Inland Revenue, and inasmuch as "the section makes him a debtor to the Crown in respect thereof, "whether he deducts it or not, that enactment must be considered "as impliedly repealing the provision of the Income Tax Acts "which makes the person who receives the interest chargeable. "In my opinion there is no such repeal at all. There is no inconsistency between the two enactments. Section 24 (3) of the Act "of 1888 simply gives the Crown a remedy against the person "paying as well as against the person receiving the interest. It "is an additional remedy; and where, as in this case, the person "paying the interest has not deducted the income tax and the "persons receiving it have received it in full without any deduction, I have no doubt that these latter persons, that is, in this "case the quarter sessions, are chargeable and have been properly "assessed." The matter came before Finlay J. in *Rye and Eyre* v. *Inland Revenue Commissioners*,[4] who said that the change in the law—this was after the Act of 1927—was a change in the machinery of collection and no more. By this time, as I have pointed out, the law had been altered from there being a mere debt to the Crown to a provision for assessment on the person who paid. Finlay J. said[5]: "It appears to me to be "abundantly clear what is the object of those provisions. The "liability to tax was in existence previously, but it is perfectly "obvious that until that amendment of the law there was a "serious difficulty of collection. The recipient could be effectively "assessed only if he or an agent of his could be found in this "country. That, obviously, might be difficult. That position "was dealt with by an alteration and improvement of machinery "of the collection of the tax, and it is an alteration and improvement of machinery and nothing else. It is an improvement in "the method of collection. It does not, which I suppose is the "test, increase the ambit of the tax. It makes it more easy to "collect the tax within the ambit already laid down."

Finally, the matter came before Upjohn J. in *Stokes* v. *Bennett*.[6] The point in that case was that the appellant, who had obtained a divorce and had obtained an order of the High

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[4] (1935) 19 T.C. 164; 51 T.L.R. 318.

[5] 19 T.C. 164, 168, 169.

[6] [1953] Ch. 566; [1953] 3 W.L.R. 170; [1953] 2 All E.R. 313.

Court that her husband should pay her maintenance at the rate of £22 per month, free of tax, was receiving that sum from her husband who was out of the United Kingdom, and the main question was, whether it was paid out of income from which tax had been deducted, and it was held that the appellant should be treated as having received sums from which tax had been deducted and so no further assessments in respect of those sums should be made on her. But in the course of his judgment Upjohn J. says[7]: "The Finance Act, 1927, improved the "machinery of collection by enabling the Crown to make an "assessment upon the person who deducted the tax and giving "them ancillary rights to enforce collection against him. But, "said Mr. Pennycuick, the power to make an assessment directly "upon the recipient remained. He relied on *Glamorgan Quarter* "*Sessions* v. *Wilson*,[8] in support of that view. Mr. Heyworth "Talbot for the appellant challenged the binding authority of that "case having regard to the passage in Lord Simon's opinion in "*Allchin* v. *Coulthard*,[9] which I have read, and to the alteration "of the law in 1927. In my judgment, the Finance Act, 1927, "only improved the machinery but was not intended to alter any "principle of collection, and *Glamorgan Quarter Sessions* v. "*Wilson*[10] is a direct decision upon the point, not directly over-"ruled by anything in *Allchin* v. *Coulthard*,[11] and is binding upon "me. I would point out, however, that Bray J., in the last "paragraph of his judgment in *Glamorgan Quarter Sessions* v. "*Wilson*[12] made it clear that he was only deciding that a gross "sum is chargeable by direct assessment upon the recipient. If, "therefore, upon the true view of the facts of this case and of the "law applicable thereto, the appellant is to be treated as having "a sum of untaxed income in her hands she is, in my view, "directly assessable to tax." Therefore, on the hypothesis which is put in that paragraph, it was the opinion of Upjohn J. that the recipient of the payment was liable to be directly assessed. Of course, in the event he decided that payment was not made out of untaxed income, and therefore the observations which he made were not part of the grounds of his decision and may be regarded as obiter dicta.

Mr. Heyworth Talbot, therefore, in his argument submitted that I should not regard myself as bound by *Stokes* v. *Bennett*[13]

[7] [1953] Ch. 566, 573.
[8] [1910] 1 K.B. 725.
[9] [1943] A.C. 607.
[10] [1910] 1 K.B. 725.
[11] [1943] A.C. 607.
[12] [1910] 1 K.B. 725.
[13] [1953] Ch. 566.

and the observations of Upjohn J. in that case, because they were purely obiter dicta, and that I should not feel myself bound by the decision of Bray J. in *Glamorgan Quarter Sessions* v. *Wilson*,[14] because that decision must be treated as obsolete in view of the alteration of the law which has been made by the Finance Act, 1927, subsequently to the decision in that case.

Therefore it becomes necessary to examine the provisions of the Income Tax Act which should be regarded as supporting the view which was reached by Upjohn J. in the later case. The provisions of sections 169 and 170 of the Act of 1952 are plainly part of the administrative provisions of the Income Tax Act, and the charging provisions are to be found elsewhere in the Act. One begins with section 1, which provides: "Where any Act "enacts that income tax shall be charged for any year at any "rates, then, subject to the provisions of this Act, the tax at "those rates shall be charged for that year in respect of all "property, profits or gains respectively described or comprised in "the Schedules contained in the sections of this Act enumerated "below, that is to say"—and then the material one is "Schedule "D—section one hundred and twenty-two"; section 122 is entitled "Charge to Tax and General," and is as follows: "The "schedule referred to in this Act as Schedule D is as follows— "Schedule D. 1. Tax under this Schedule shall be charged in "respect of—(*a*) the annual profits or gains arising or accruing" —from various things which are mentioned thereafter, which undoubtedly would include the payments in the present case. Section 148, which is probably the most important section on this part of the matter, is in these terms: "Miscellaneous Pro- "visions as to Schedule D. 148. Tax under Schedule D shall "be charged on and paid by the persons receiving or entitled to "the income in respect of which tax under that Schedule is in "this Act directed to be charged." That is plainly the material charging section and one of the most important with regard to the present case, and if it may be said that section 170 (2) is mandatory on the special commissioners in that it directs them to make assessments on the person who pays, then this also may be said to be mandatory in a sense, because again you have the word "shall"—". . . shall be charged on and paid by the "persons receiving or entitled to the income in respect of which "tax under that Schedule is in this Act directed to be charged."

It was contended, I think with considerable force and reason, by Mr. Heyworth Talbot that the special commissioners have failed to carry out the duty which is laid on them by section 170 (2), which says quite definitely that they " shall assess and " charge the payment for which an account is so delivered on that " person "; and subsection (3) provides: " The special commis-" sioners may, where any person has made default in delivering " an account required by this section, or where they are not " satisfied with the account so delivered, make an assessment " according to the best of their judgment." In the present case, apparently, there was no difficulty in deciding what was the proper amount to be charged, although no proper account seems to have been rendered by the National Coal Board. Therefore it seems to me that primarily the duty of the special commissioners was to make an assessment on the National Coal Board and not on the company. I am not intending to impute any moral blame to them in that respect, because if I think that they ought to have made such an assessment, according to the state of the law as they saw it, they believed that they were not under any necessary duty to do so. But it does seem to me that it was no reason for saying that they should refrain from assessing the persons who paid by virtue of the fact that the payees received their rents without any deduction of tax. It seems to me that it is not the duty of the special commissioners to try to assess the moral liability of people who are concerned with tax, but to carry out the provisions of the Acts which direct them to do something or not to do something, and that therefore primarily, quite plainly according to the provisions of section 170 (2), an assessment ought to have been made on the National Coal Board.

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[14] [1910] 1 K.B. 725.

Mr. Heyworth Talbot went further than that, because he referred me to section 36, which provides: " (1) Statements of " profits or gains under Schedule D shall, unless an assessment " thereon is required to be made by the special commissioners, " be laid before the additional commissioners, and the additional " commissioners shall appoint meetings for the consideration of all " such statements as are from time to time delivered to them." It will have been observed that under section 170 (2) the assessment is required to be made not by the additional commissioners under that provision, but by the special commissioners. Consequently it seemed, at first sight, that Mr. Heyworth Talbot had a very convincing argument in favour of the view that the additional commissioners, it may be said in the present case, had no power whatever to make any such assessments on anybody. But my

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attention was called also by Mr. Bucher to section 38, which provides: "A person chargeable under Schedule D may require "that all proceedings in order to an assessment upon him "under that schedule shall be taken before the special commissioners, instead of before the additional commissioners, and in "that case shall deliver a notice of his request, together with "the statement of his profits or gains, to the surveyor of the "district." It is certainly a possible construction of section 36 that the words "unless an assessment thereon is required to be "made by the special commissioners" may be a reference to the power to elect in the taxpayer to have the proceedings brought before the special commissioners contained in section 38. There is an additional point which also emerged finally in the course of the argument in this case: it is possible that the provision to which I have referred in section 170 (2) does not exclude an assessment by the additional commissioners on the recipient of payments by virtue of section 36. It is quite a possible view that section 170 (2) is saying: "If you assess the person who "pays, the assessment shall be made by the special commissioners." That may be so, but it does not necessarily follow from that that an assessment on the recipient cannot be made by the additional commissioners, as has been made in the present case.

The matter is obviously one of considerable complication and difficulty. I have gone through the various sections and considerations that apply, and I think, in the situation which has emerged, that I am bound to apply the decision of Bray J. in *Glamorgan Quarter Sessions* v. *Wilson*,[15] although it was before the Act of 1927, and that I must follow the observations and the view which was reached by Upjohn J. in *Stokes* v. *Bennett*[16] and hold that in this case the assessments have been properly made on the recipients of the rents. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

K. R. A. H.

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[15] [1910] 1 K.B. 725.

[16] [1953] Ch. 566.

WILKINS (INSPECTOR OF TAXES) v. ROGERSON.

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Feb. 16.

Danckwerts J.

Revenue — Income tax — Employment — Perquisite — Valuation — Cost or value in hands of recipient—Gift from employer of new suit of clothes—Whether employee taxable on second-hand value only of suit—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *Sch.* 9, *r.* 1.

In 1955 the directors of a company decided to give to each of their employees a suit, overcoat or raincoat made by a named tailor as a Christmas present. They requested the tailor to give each employee a fitting and requested each employee to call at a branch of the tailor and order a suit, overcoat or raincoat as he chose. The bills were to be sent to the company. One of the employees called at a branch of the tailor, ordered a suit and in due course received it. His suit cost £14 15s., which sum the company paid. A sum of £14 15s. in respect of the suit was included in an assessment made on the employee under Schedule E of the Income Tax Act, 1952,[1] for the year 1955 to 1956, as part of the "perquisites or profits" arising from his employment. The employee appealed to the special commissioners, who held that the amount to be included was not £14 15s., but the value of the suit in his hands on the footing that he could immediately have sold it only as second-hand, which value was agreed at £5. On appeal by the Crown:—

Held, that "perquisites or profits" in rule 1 of Schedule 9 to the Income Tax Act, 1952,[1] meant the perquisites or profits which had been received by the employee whom it was desired to tax; that where a taxpayer received something and it was in his hands as the result of the transaction which had been carried out, the amount of the profit which he had received was the value in his hands of what he had got; and that, accordingly, the benefit which the employee had received was the value of the suit in his hands, and that value, £5, was the amount which should be included in his taxable income for the purposes of Schedule E.

Weight v. *Salmon* (1934) 19 T.C. 174 and *Ede* v. *Wilson* (1942) 26 T.C. 381 applied.

Nicoll v. *Austin* (1935) 19 T.C. 531 distinguished.

Dictum of Lord Macnaghten in *Tennant* v. *Smith* (1892) 3 T.C. 158, 161 applied.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent taxpayer, S. A. Rogerson, appealed to the special commissioners against an assessment made on him under

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[1] Income Tax Act, 1952, Sch. 9, r. 1: "Tax under Schedule E shall "be annually charged on every person "having or exercising an office or "employment of profit mentioned in "Schedule E, or to whom any "annuity, pension or stipend charge- "able under that schedule is pay- "able, in respect of all salaries, fees, "wages, perquisites or profits what- "soever therefrom for the year of "assessment . . ."

Schedule E of the Income Tax Act, 1952, for the year 1955–56 in the sum of £1,036 on the ground that a sum of £14 15s. paid by his employers for a suit bought by them as a present to him and supplied to him by Montague Burton Ltd. was wrongly included in computing the amount of his salary, fees, wages, perquisites or profits within the meaning of rule 1 of Schedule 9 to the Act.

The following were among the facts found by the special commissioners: The taxpayer was for the whole of the material year an employee of a company, the Anglo-Oriental and General Investment Trust Ltd. His duties were almost exclusively secretarial and were performed solely at the head office of the company at 55–61, Moorgate, E.C.2, and he was remunerated for his employment by a salary and, at the discretion of the directors, bonuses based on salary. The bonuses were usually paid to him in June and before Christmas in each year. In the material year, 1955–56, he received his usual bonuses and there was no issue before the special commissioners as to his liability to be assessed under rule 1 of Schedule 9 to the Act in respect of that salary and those bonuses.

In 1955 the board of directors of Anglo-Oriental decided to give to all its male staff other than executives a Christmas present up to the value of £15 of clothes, suitable for wear at the office, drawn from a choice from or combination of a suit, overcoat or raincoat; the clothes to be purchased by Anglo-Oriental from Montague Burton Ltd. (hereinafter called "the tailors"). A letter to this effect was sent by Anglo-Oriental to the tailors on November 7, 1955, and the taxpayer's name was on a list of 22 employees whose names were supplied to the tailors. The letter constituted a formal order to the tailors to supply the goods on behalf of the individuals named in the list and contained the following instructions: "Please supply these with suits, overcoats "or raincoats as above and send us your account in due course. "We stress that the bill will be paid by this company and no cash "payment either way can be made between £15 and the actual "cost of the clothes. We have advised the staff to call on you "on or after Thursday, November 10, 1955, to choose a cloth and "to be measured etc., and trust that this will be convenient to "you." On the same date, namely, November 7, 1955, a letter was sent to the taxpayer in similar terms to the letter sent to the tailors. The last paragraph was as follows: "Messrs. Montague "Burton will provide a fitting if this is required and asked for. "They will also make alterations if required. Both fittings and "alterations will take additional time." The tailors' account for goods supplied to 21 employees of Anglo-Oriental (one name having been removed after November 7, 1955), was rendered to Anglo-Oriental on February 29, 1956, and included goods supplied to the taxpayer to an amount of £14 15s. The account was paid by Anglo-Oriental on the same date. On receipt of the letter from Anglo-Oriental the taxpayer called at the tailors' Cheapside premises and was in due course supplied with a suit. This was his own choice and he could have selected an overcoat or raincoat instead of a suit. Thereafter, he continued as previously to buy suits for himself from another tailor and paid more than £14 15s. for them. On average, he wore the suit made by the tailors once or twice a week at the office on ordinary working days. It was his usual custom when he returned home to change his suit, whether supplied by the tailors or otherwise, and to wear less formal clothing. He anticipated, however, that the suit supplied to him by the tailors would be discarded sooner than his other suits because, owing to its lower quality and cut, it would become shabby more quickly. There was no condition in writing or orally as to a refund to Anglo-Oriental if he left their employment before the suit was worn out. There was no evidence that Anglo-Oriental had forbidden the taxpayer to sell the suit, but he entertained no doubt that they would have been displeased if he had done so: in any event he had made no such attempt. Shortly after the suits were supplied by the tailors to the taxpayer and his other colleagues, one of the directors or other officials of Anglo-Oriental made a point of inspecting them.

It was contended for the Crown that the taxpayer received in the year 1955–56, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was money's worth, namely, a suit of clothes; that, on the evidence, that advantage of money's worth fell to be measured by the price paid by Anglo-Oriental to the tailors for the suit, that was, the sum of £14 15s.; that that sum was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1, Schedule 9 to the Income Tax Act, 1952; and that the assessment for the year 1955–56 ought to be confirmed.

It was contended for the taxpayer that, on the evidence, the value of the suit was not salary, fees, wages, perquisites or profits of the taxpayer from his employment within the meaning of rule 1 of Schedule 9 to the Income Tax Act, 1952; that the suit was not

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an advantage received by him by virtue of his employment which was capable of being turned into money, because his employers would have been displeased if he had sold it; alternatively that, if the value of the suit was an advantage received by him by virtue of his employment which was capable of being turned into money, the value was not the price paid by Anglo-Oriental to the tailors, namely, £14 15s., but the sum which he could have raised by the sale of the suit in November, 1955, and that that sum was very small; and that no sum, or, in the alternative, a very small sum, should be included in respect of the sum in computing the amount of his emoluments from his employment for the year 1955–56.

The special commissioners considered that in the year 1955–56 the taxpayer received, in addition to the cash emoluments of his employment, an advantage by virtue of that employment which was capable of being turned into money, but were, however, unable to accept the Crown's contention that that advantage was the price paid to Montague Burton for the suit, and they held that the money's worth of the suit must be valued by reference to the market value when it became the appellant's property, such value being the second-hand value in November, 1955. No evidence was before the commissioners as to the second-hand value of the suit and the case was set down for a further hearing.

Subsequently it was reported to the special commissioners that it had been agreed between the Crown and the taxpayer that the taxpayer could have sold the suit unworn in November, 1955, for the sum of £5, and, accordingly, the special commissioners reduced the assessment to £1,027.

The Crown appealed.

Hilary Magnus Q.C. and *Alan S. Orr* for the Crown. It is common ground that the taxpayer received an emolument taxable under Schedule E. The question is, is he to be taxed on £14 15s., the amount spent by the employer in providing him with a suit, or on £5, the price at which he could have sold the suit? The Crown contends that where, as here, there is an arrangement between employer and employee whereby the employer spends money in providing goods or services for the employee, the amount spent is the measure of liability: see *Nicoll* v. *Austin*,[2] which is the Crown's sheet anchor. It is immaterial that the arrangement here did not involve an enforceable promise on the part of the employer. *Weight* v. *Salmon*[3] and *Ede* v. *Wilson*,[4]

[2] (1935) 19 T.C. 531.

[3] (1934) 19 T.C. 174.

[4] (1942) 26 T.C. 381.

on which the special commissioners relied, were not cases in which an employer spent anything on an employee, and the dicta in *Tennant* v. *Smith*,[5] if considered in the context of the facts in that case, are seen not to be relevant here. [Reference was made to *Hartland* v. *Diggines* [6] and *Cunard's Trustees* v. *Inland Revenue Commissioners*.[7]] The court would not have been troubled with this case had the taxpayer been authorised to purchase a suit direct, the employers undertaking to reimburse the amount spent by him: *Hartland* v. *Diggines*.[8] There is no difference in principle between that arrangement and the arrangement here. For these reasons the assessment of £1,036 should be confirmed.

C. N. Beattie, for the taxpayer, was not called on.

DANCKWERTS J. This is an appeal from the special commissioners. The facts are extremely simple. In the year 1955 a company decided to make a present to 22 (or, as it turned out, 21) of its employees of a suit of clothes or an overcoat or a raincoat which were to be obtained by the employees from Montague Burton Ltd. They, accordingly, wrote to Montague Burton Ltd. and asked them to fit out the employees in question with the necessary clothing. At the same time they wrote to the employees, authorising them to order a suit or an overcoat or a raincoat at a branch of Montague Burton Ltd. as they desired. No money was to pass on either side, and the bills for the clothing had to be sent to the company. They were, in fact, sent to the company, and were duly paid.

The respondent taxpayer in this case is one of the 21 employees. He went to a branch of Montague Burton Ltd. and ordered a suit which was priced £14 15s. He paid no money, of course, and he got his suit. He was assessed by the Inland Revenue Commissioners on the amount of £14 15s. as an addition to his salary which he got from the company. His duties were secretarial, and he worked at the head office of the company. On that assessment he appealed to the special commissioners, contending that the payment in respect of the suit did not form part of his taxable salary at all; or, alternatively, that the amount on which he was taxable was not the amount paid by the company.

The first question was decided against him by the special commissioners, and from that there is no appeal: but the special commissioners decided that the amount to be brought into account for the purpose of the employee's tax was not the sum of £14 15s., but was whatever the value of the suit was in the hands of the employee, on the footing that he could sell it as a second-hand suit as soon as he got it. By agreement, the amount of that value was fixed at £5. Accordingly, the amount of £5 was the sum which the special commissioners held should be added to his taxable income, and it is from that decision that the Inland Revenue appeal. It seems to me that the decision of the special commissioners was perfectly correct.

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[5] (1892) 3 T.C. 158, 161.

[6] [1926] A.C. 289; 42 T.L.R. 262, H.L.

[7] (1945) 27 T.C. 122.

[8] [1926] A.C. 289.

Reliance has been placed by the Inland Revenue on such cases as *Nicoll* v. *Austin*,[1] where a director was asked by his company to continue to reside at the house which he had, the company promising to pay all the expenses which he incurred or which were required to be discharged in respect of the house, because they seemed to think that it would increase the prestige of the company. Accordingly, a number of payments were made for that purpose. The amounts actually spent by the company in pursuance of the agreement were the sum of £58 12s. 2d. for rates, water, etc.; £51 8s. 9d. for light, heat, and so on; telephone, etc., £8 0s. 3d.; and the upkeep of gardens, amounting to £196 4s. 11d. That made a total of £314 6s. 1d. That was the sum which was to be added, it was held, to the director's income assessable under Schedule E. Of course, in that case the amount was the actual amount which had been expended by the company.

It seems to me that the circumstances of that case are distinguishable from the facts of the present case; and it is necessary that I should refer to rule 1 of Schedule 9 to the Act of 1952, which contains the rules applicable to Schedule E. That provides: "Tax under Schedule E shall be annually charged on every "person having or exercising an office or employment of profit "mentioned in Schedule E, or to whom any annuity, pension or "stipend chargeable under that schedule is payable, in respect of "all salaries, fees, wages, perquisites or profits whatsoever there-"from for the year of assessment, after deducting the amount of "duties or other sums payable or chargeable on the same by virtue "of any Act of Parliament, where the same have been really and "bona fide paid and borne by the party to be charged." I draw attention to the fact that it is attached on the "perquisites or "profits," and, to my mind, that means the perquisites or profits which have been received by the employee whom it is desired to tax. Before the commissioners reliance was placed by the Crown on that case of *Nicoll* v. *Austin*.[2]

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[1] (1935) 19 T.C. 531.

The commissioners based their decision upon such cases as *Weight* v. *Salmon*[3] and *Ede* v. *Wilson*,[4] both of which were cases where the claim by the Inland Revenue was made in respect of certain shares which the company allowed an employee to acquire at par value when the shares were of considerably greater value. The employee there had to pay the sum required, which was charged at par value; and it was held in those cases that he was taxable on the difference as between that and the actual value of the shares. In other words, he was taxed on the value of that which he received.

It may be perfectly true that in certain cases, of which *Nicoll* v. *Austin*[5] is an example, it is not possible to measure the value of what the employee has received except by taking the amount of the payment which has been made for the purpose of conferring the advantages which he has received; accepting that those cases are perfectly correctly decided, it may be that is because that is the only standard which can be applied in those cases. But when you have a case where you can see that the employee has received something, and that that something is in his hands as a result of the transaction which has been carried out, then it seems to me that the amount of the profit which the employee has received, the emolument in question, is the value of what he has got. It seems to me that, having due regard to the very proper observations as to statements by judges being considered with respect to the facts of the cases with which they are dealing, nonetheless the observation of Lord Macnaghten in *Tennant* v. *Smith*[6] is applicable to the present case; that is to say, that the employee is to be taxed "not on what saves his pocket, but on "what goes into his pocket."

It is true that if the employee in the present case had been told to go to Montague Burton Ltd. and order the suit and pay for it, and had been promised that the company would then reimburse him the amount which he had paid, the benefit which he would have got would have been the amount paid by the company to him as reimbursement of his expenditure. It is quite true that a different result is produced according to the way in which the transaction is carried out, but certainly, having regard to one's tax experience, nothing is more common than to find such a situation. It seems to me that in the present case the benefit which the taxpayer received was the value of the suit in his hands, which he received as a result of the generosity of the company which employed him.

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[2] 19 T.C. 531.
[3] (1934) 19 T.C. 174.
[4] (1942) 26 T.C. 381.
[5] 19 T.C. 531.
[6] (1892) 3 T.C. 158, 161.

Accordingly, the decision of the special commissioners was correct, and the amount to be added to the taxable income for Schedule E is the sum of £5. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Slaughter & May.*

K. R. A. H.

1960
Feb. 15.

Danckwerts J.

INLAND REVENUE COMMISSIONERS *v.* BERNSTEIN.

Trusts—Power of advancement—Contrary intention—Direction to accumulate income—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2).

Trusts—Power of advancement—" Prior " interests—Contingent interests of unborn children—Trustee Act, 1925, *s.* 32 (1) (*c*).

Trusts—Distribution of fund—Woman incapable of child-bearing—Power of court to dispense with consents—Whether Inland Revenue may invoke power.

Revenue—Income tax—Settlement—Trust for accumulation during life of settlor—Contingent interest of settlor's wife—Whether statutory power of advancement applicable—Whether income to be treated as income of settlor—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *ss.* 32 (1), 69 (2)—*Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 405 (1) (2).

By a settlement dated October 16, 1947, a fund was settled on trust to accumulate the income therefrom during the life of the settlor, and after his death on trust as to one-third for the children then living of the settlor by the beneficiary, his present wife, and as to two-thirds for the beneficiary absolutely; if the beneficiary died during the lifetime of the settlor the fund was to be held on trust for her children living at his death, but if at the death of the settlor there were living no children of his by the beneficiary, then on trust for the beneficiary absolutely, and if she should die during the settlor's lifetime without leaving any children, on trust for her sister absolutely. The settlor appealed to the special commissioners against assessments to surtax for the years 1950–51 to 1953–54 in respect of income arising under the settlement, and the Crown contended that by virtue of the statutory power of advancement under section 32 of the Trustee Act, 1925,[1] one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952, and that, accordingly, one half of the income under section 405 (1) was to be treated as his income. The special commissioners discharged the assessments, and the Crown appealed:—

Held, that the trust for accumulation during the lifetime of the settlor showed an intention that no income should be distributed during that period and was an expression of a "contrary intention" within section 69 (2) of the Trustee Act, 1925, negativing the power of advancement in section 32 (1); and that, therefore, the statutory power of advancement did not apply and no advance could be made of either capital or income during the lifetime of the settlor. Accordingly, that contention of the Crown failed and the appeal must be dismissed.

In re Turner's Will Trusts [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435, C.A. applied.

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[1] Trustee Act, 1925, s. 32: "(1) "Trustees may at any time or times "pay or apply any capital money "subject to a trust, for the advancement or benefit, in such manner as "they may, in their absolute discretion, think fit, of any person "entitled to the capital of the trust "property or of any share thereof . . . "Provided that—(*a*) the money so "paid or applied for the advancement "or benefit of any person shall not "exceed altogether in amount one-half "of the presumptive or vested share "or interest of that person in the "trust property; . . . (*c*) no such "payment or application shall be "made so as to prejudice any person entitled to any prior life or "other interest, whether vested or "contingent, in the money paid or "applied unless such person is in "existence and of full age and consents in writing to such payment or "application."

S. 69 (2): "The powers conferred "by this Act on trustees are in addition to the powers conferred by the "instrument, if any, creating the "trust, but those powers, unless "otherwise stated, apply if and so far "only as a contrary intention is not "expressed in the instrument, if any, "creating the trust, and have effect "subject to the terms of that instrument."

Income Tax Act, 1952, s. 405: "(1) If and so long as the settlor has "an interest in any income arising "under or property comprised in a "settlement, any income so arising "during the life of the settlor in any "year of assessment shall, to the "extent to which it is not distributed, "be treated for all the purposes of "this Act as the income of the settlor "for that year and not as the income "of any other person: Provided that "—(*a*) if and so long as that interest "is an interest neither in the whole "of the income arising under the "settlement nor in the whole of the "property comprised in the settlement, the amount of income to be "treated as the income of the settlor "by virtue of this subsection shall be "such part of the income which, but "for this proviso, would be so treated "as is proportionate to the extent of "that interest. . . .

"(2) For the purpose of subsection "(1) of this section, the settlor shall "be deemed to have an interest in "income arising under or property "comprised in a settlement if any "income or property which may at "any time arise under or be comprised in that settlement is, or will "or may become, payable to or applicable for the benefit of the settlor or "the wife or husband of the settlor in "any circumstances whatsoever: . . ."

Held, further, (1) that the interests of unborn children during the lifetime of the beneficiary were contingent and subject to her interests and were not, therefore, "prior interests" within the meaning of section 32 (1) (*c*) of the Trustee Act, 1925.

(2) That the practice of the Chancery Division in dispensing with consents and allowing the distribution of a trust fund where the court was satisfied that a woman was incapable of child-bearing was a rule of practical administration which could not be invoked to aid the Inland Revenue to claim payment of tax in circumstances which were still hypothetical.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

A settlor, William Bernstein, appealed against assessments made on him to surtax for the years 1950 to 1951, 1951 to 1952, 1952 to 1953 and 1953 to 1954 in the sums of £6,102 (additional), £6,659, £1,338 (additional) and £4,630 (additional), respectively, on the basis that under section 405 of the Income Tax Act, 1952, one-half the income arising under a settlement made by him on October 16, 1947, was to be treated as his income.

The commissioners found, inter alia, that the settlement, dated October 16, 1947, after reciting that a certain sum of money had been paid by the settlor to the trustees thereof, and after making provision for the investment of the trust fund, provided as follows:

"2. The trustees shall during the life of the settlor accumulate "the income of the trust fund at compound interest by investing "the same and the resulting income thereof in any of the invest-"ments hereby authorised in augmentation of the capital of the "trust fund and for the benefit of the person or persons who "shall eventually become entitled thereto.

"3. After the death of the settlor the trustees shall hold the "trust fund as to one equal third part thereof in trust for all or "any of the children or child then living of the settlor by the "beneficiary [the settlor's present wife] (if more than one in "equal shares) and as to two equal third parts thereof in trust "for the beneficiary absolutely but if the beneficiary dies in the "lifetime of the settlor leaving children or a child her surviving "then the trustees shall hold the trust fund in trust for all or any "of such children or child who shall be living at the death of the "settlor if more than one in equal shares absolutely.

"4. If at the death of the settlor there shall be living no child "of the settlor by the beneficiary the trustees shall hold the trust "fund in trust for the beneficiary absolutely but if the beneficiary "dies in the lifetime of the settlor without leaving any children or "a child by the settlor or her surviving then the trustees shall "hold the trust fund in trust for Muriel Clara Selina Thoms "sister of the beneficiary absolutely."

The settlor and his wife were both living, they had had no children, and all income of the trust fund had been accumulated in accordance with clause 2 of the settlement.

It was contended on behalf of the Crown that the trustees of the settlement had, under section 32 of the Trustee Act, 1925. power at any time or times to pay or apply for the advancement or benefit of the settlor's wife one-half of the trust fund; that by virtue of such power one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within section 405 (2) of the Income Tax Act, 1952; that by section 405 (1) and proviso (*a*) one-half of the income arising under the settlement in the relevant years was accordingly to be treated as the income of the settlor; and that the assessments were correct in principle and (subject to adjustment of the figures) should be confirmed.

It was contended on behalf of the settlor that the power of advancement contained in section 32 of the Act of 1925 was not applicable to the settlement, inasmuch as on the true construction of the deed of settlement it contained an indication of a contrary intention (Trustee Act, 1925, s. 69 (2)); that if, contrary to his contention, the statutory power of advancement was to be read into the settlement, such power could not be exercised in favour of the settlor's wife without the prior consent of the persons (born or unborn) who had "prior interests" within section 32 (1) (*c*) of the Trustee Act, 1925; that possible children of the settlor by his wife had such "prior interests," and their consent being unobtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, and that those interests extended to the income of the whole of the trust fund and the accumulations of the income and, alternatively, in one-third of the trust fund; that the settlor could not be deemed to have an interest in the income arising from the settlement within section 405, and that the assessments under appeal should be discharged.

The commissioners considered that the statutory power of advancement in section 32 of the Trustee Act, 1925, was not inconsistent with any express provision of the settlement and should be read into it, but that unborn children had interests in the whole of the capital of the trust fund which were "prior "interests" within proviso (c) to section 32 (1). Since the Crown did not dispute that if that were right no advancement could be made owing to the impossibility of obtaining consents, the commissioners accordingly allowed the appeal and discharged the assessments.

The Crown appealed.

Before the High Court the Crown restricted its claim to one-half of the income of the two-thirds only of the trust fund in which the wife of the settlor had the primary interest, and it advanced the additional argument that the settlor had an interest because beneficiaries having prior interests could consent to an advance to his wife, and a time might come during the lifetime of the settlor, on the assumption that his wife could be treated as past child-bearing after a certain age, when all such beneficiaries, if any, would be sui juris and able to consent.

John Pennycuick Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the appellants. The statutory power of advancement is applicable: there is no indication of a contrary intention within the meaning of section 69 (2) of the Trustee Act, 1925, to exclude it, and there are no prior interests, and, even if there were, there has throughout been the possibility that the persons with such interests would be ascertained, sui juris and entitled to take.

Even if, contrary to the appellants' contention, the consent of further reversioners to advances to nearer reversioners were required, a settlor must still be able to show that no income or capital can be payable to his wife during his lifetime; this settlor is unable to show this: he and his wife have no children, the trust is for "children" only and not for "issue," and the only other person interested is the sister of the settlor's wife, who can consent to an advance to the settlor's wife.

Where there is a trust for accumulation followed by a trust of capital the persons interested in capital have no interest during the period of accumulation, but merely an ancillary right to see that the income is dealt with in accordance with the terms of the trust. [Reference was made to *In re Beckett's Settlement*.[2]]

Sir Lynn Ungoed-Thomas Q.C. and *C. N. Beattie* for the respondent. There is a contrary intention to exclude the power of advancement. *In re Turner's Will Trusts*[3] should be followed.

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[2] [1940] Ch. 279; 56 T.L.R. 342.

[3] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435 (C.A.).

In this case also there is an express trust for accumulation, thus evidencing a contrary intention. In construing section 69 (2) one must first look at the instrument, without reading the statutory powers into it, to see if it expresses a contrary intention, and, if it does not, the powers imported into it take effect subject to the terms of the instrument. A provision for accumulation cannot take effect on what is left of capital after an advance has been made, any more than in *In re Turner's Will Trusts* [3] it was accepted that the accumulation should operate on surplus income. Further, the amount of income which may be advanced is not ascertainable during the period of accumulation, since it varies with the investments. In *In re Spencer* [4] a distinction was made between ancillary administrative provisions, which by their nature contemplate the accumulation of income, and which are thus powers enabling section 69 (2) to operate, and an express direction to accumulate, which is imperative.

To make an advance is to prejudice the interests of unborn children. Until the settlor dies it is not known who will take under clause 2; therefore until that time there must always be an unborn person who may take and who cannot consent. *In re Beckett's Settlement* [5] is distinguishable, since under clause 2 the gift here is to specified though unascertained persons who become entitled if they qualify. They have prior interests in that they have power to deal with the income before any question of capital can arise. It is immaterial that the persons entitled to prior interests were not ascertained when the settlement was made or that income goes to the person entitled to capital or that income and capital are distributable at the same time.

It is not legitimate to regard the settlor's wife as incapable of child-bearing. The limitations of the settlement do not contemplate this, and, accordingly, it is not contemplated by section 405 of the Income Tax Act, 1952. As a matter of business administration if a woman were over 60 years of age the trustees could apply to the court for consent to distribute a trust fund, but such consent would not necessarily be effective: *In re Dawson.*[6] [Reference was made to *In re Deloitte,*[7] *In re Hocking*[8] and *Berry* v. *Geen.*[9]]

Beattie following. If it were correct that the settlor had an interest within section 405 of the Income Tax Act, 1952, by reason of the possibility that all beneficiaries with prior interests might consent to an advance to the settlor or his wife, it would follow that in any settlement where the settlor or his wife had a contingent interest half the income must be treated as the income of the settlor under the section. One could not come to that ridiculous conclusion unless the statute clearly so stated. The words " in any circumstances whatsoever " in section 405 (2) were subject to certain expressed limitations. A limitation should also be implied that the remote possibility of beneficiaries consenting to an advance was not contemplated by section 405 (2).

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[4] [1935] Ch. 533, 542.
[5] [1940] Ch. 279.
[6] (1888) 39 Ch.D. 155.
[7] [1926] Ch. 56.
[8] [1898] 2 Ch. 567 (C.A.).
[9] [1938] A.C. 575; 54 T.L.R. 703; [1938] 2 All E.R. 362 (H.L.).

John Pennycuick Q.C. in reply. To exclude section 32 there must be a clear contrary intention. It is not sufficient to say that the exercise of the power will diminish the fund, the income of which is for the benefit of someone other than the person to whom the advance is made. No contrary intention can be inferred from a trust for accumulation. [Reference was made to *In re Rees.*[10]] So far as the determination of legal rights is concerned, it is accepted that a woman cannot be deemed to be incapable of child-bearing, but as an administrative matter the court will direct income to be distributed on that basis: *In re White.*[11]

DANCKWERTS J. This is an appeal by the Commissioners of Inland Revenue from the special commissioners in respect of certain claims to assess a settlor in respect of surtax by virtue of a settlement which he made dated October 16, 1947.

The settlement recites that the settlor is desirous of making provision for a lady—called in the settlement the beneficiary—who afterwards became his wife. The material provisions of the settlement for the purposes of this case are contained in paragraphs 2 and 3. Clause 2 provides: " The trustees shall during " the life of the settlor accumulate the income of the trust " fund at compound interest by investing the same and the result- " ing income thereof in any of the investments hereby authorised " in augmentation of the capital of the trust fund and for the " benefit of the person or persons who shall eventually become " entitled thereto." Therefore, there is to be an accumulation during the life of the settlor, and the settlement contemplates that no income will be distributed before his death. Clause 3 provides: " After the death of the settlor the trustees shall hold " the trust fund as to one equal third part thereof in trust for all

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[10] [1954] Ch. 202; [1954] 2 W.L.R. 59; [1954] 1 All E.R. 7.

[11] [1901] 1 Ch. 570.

" or any of the children or child then living of the settlor by the " beneficiary (if more than one in equal shares) and as to two " equal third parts thereof in trust for the beneficiary absolutely " but if the beneficiary dies in the lifetime of the settlor leaving " children or a child her surviving then the trustees shall hold " the trust fund in trust for all or any of such children or child " who shall be living at the death of the settlor if more than one " in equal shares absolutely."

I should also refer to clause 4 which reads: " If at the death " of the settlor there shall be living no child of the settlor by the " beneficiary the trustees shall hold the trust fund in trust for " the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor without leaving any children or a child by " the settlor or her surviving then the trustees shall hold the trust " fund in trust for Muriel Clara Selina Thoms sister of the " beneficiary absolutely." Consequently, the trusts are in effect these: as regards an equal one-third part the beneficiaries in order are the children or child living at the death of the settlor by the beneficiary; as regards two equal third parts thereof the first trust is for the beneficiary absolutely with a trust for the children if the beneficiary dies within the lifetime of the settlor leaving children or a child surviving her; finally, if the beneficiary outlives the settlor and there are no children living of the settlor by her she takes an absolute interest, and if she does not—that is to say, if she dies within the settlor's lifetime—her sister comes in instead.

Those are the trusts and they are comparatively simple in outline. The claim is made by virtue of section 405 of the Income Tax Act, 1952. Section 405 (1) provides: " If and so long as the " settlor has an interest in any income arising under or property " comprised in a settlement, any income so arising during the life " of the settlor in any year of assessment shall, to the extent to " which it is not distributed, be treated for all the purposes of this " Act as the income of the settlor for that year and not as the " income of any other person." I need not read the provisos, which are not applicable here. Turning to subsection (2), it provides that " For the purpose of subsection (1) of this section, " the settlor shall be deemed to have an interest in income arising " under or property comprised in a settlement if any income or " property which may at any time arise under or be comprised " in that settlement is, or will or may become, payable to or " applicable for the benefit of the settlor or the wife or husband " of the settlor in any circumstances whatsoever."

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INLAND REVENUE COMRS. v. BERNSTEIN.

Danckwerts J.

There is no question of any income becoming payable to or applicable for the benefit of the settlor, but it is contended that in certain circumstances the income of this trust fund might become payable to or applicable for the benefit of the settlor's wife by virtue of the power of advancement contained in section 32 of the Trustee Act, 1925. I described this as a very long shot and I still think that as a statutory provision it is a remarkable effort at bringing in things which are looked at from a very long range.

Section 32, which is the material section of the Trustee Act, 1925, provides: "(1) Trustees may at any time or times pay or "apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute "discretion, think fit, of any person entitled to the capital of the "trust property or of any share thereof, whether absolutely or "contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death "under any specified age or on the occurrence of any other event, "and whether in possession or in remainder or reversion, and "such payment or application may be made notwithstanding that "the interest of such person is liable to be defeated by the "exercise of a power of appointment or revocation, or to be "diminished by the increase of the class to which he belongs." In the present case, of course, Mrs. Bernstein is entitled contingently on surviving the settlor to two-thirds of the capital of the property and there will be added to that two-thirds the appropriate part of the income which was accumulated during the settlor's lifetime.

The first proviso limits the amount of the advancement to one-half of the presumptive or vested share. The important proviso is (*c*) which provides that "no such payment or application shall "be made so as to prejudice any person entitled to any prior life "or other interest, whether vested or contingent, in the money "paid or applied unless such person is in existence and of full "age and consents in writing to such payment or application." It is plain that the settlor takes no interest in the income of the trust fund, and that his wife takes no interest in the income of the trust fund except contingently on it being added to the capital and her surviving the settlor. The claim of the Revenue depends entirely on section 32 of the Trustee Act, 1925, being available in such a way that during the lifetime of the settlor income comes to his wife in some way or other. Consequently, the application of section 32 is vital to the contentions of the Inland Revenue.

There is another section, section 69 (2) of the Trustee Act, 1925, which is applicable and this is one of the first points in the case.

[His Lordship read section 69 (2) and continued:] The first point which was argued before the commissioners on behalf of the taxpayer was that there is a contrary intention within the meaning of section 69 (2) of the Trustee Act, 1925, which is found to be expressed in this settlement. I have been referred to certain cases which are not directly in point upon this section, but were concerned with section 31 (1) (ii) of the same Act which provides for maintenance and more particularly provides that after the beneficiary reaches the age of 21 but is still not entitled to a vested interest in the income the trustees are to pay the income of the trust fund to him until he attains a vested interest, or dies, or his interest fails. In regard to that section there are three cases: *In re Spencer*,[1] *In re Ricarde-Seaver's Will Trusts*[2] and *In re Turner's Will Trusts*,[3] the last, a decision of the Court of Appeal, being the only case which seems to me to be of any real assistance in the present matter. Although the provision in section 31 (1) (ii) is expressed in an imperative form, it was held in *In re Turner's Will Trusts*[4] that it was not imperative as it was merely a power. Consequently, as it was merely a power and there was a provision for accumulation in the relevant will, that provision for accumulation was an expression of a contrary intention for the purposes of section 69 (2) of the Trustee Act, 1925, and therefore negatived the provision contained in section 31 (1) (ii).

Although that was a decision on a different section it may be applicable in the present case for this reason: from the way this settlement is drawn, and in particular from the fact that clause 2 is an entirely separate provision from clause 3 and in the plainest possible terms provides for accumulation during the lifetime of the settlor, it seems to me that there is an intention that no income shall be distributed before the death of the settlor. It is true that section 31 deals directly with income, but this case is very closely allied, for if the power of advancement be exercised, the effect is to cut off the appropriate portion of the income after that advancement, and of necessity the operation must put an end to the trust for accumulation to that extent. This trust for accumulation is thus inconsistent with the trust for advancement contained in section 32 of the Trustee Act, 1925. Section 32, therefore, is not applicable in the present case and, accordingly, no advances can be made of either capital or income to the beneficiary during the settlor's lifetime. That, of course, is the end of the claim of the Inland Revenue under this particular section, if it is correct.

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[1] [1935] Ch. 533.

[2] [1936] W.N. 146; 52 T.L.R. 508; [1936] 1 All E.R. 580.

[3] [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435 (C.A.).

[4] [1937] Ch. 15.

I will now deal with the other two points. The second point was that it was claimed on behalf of the settlor—and this argument succeeded before the commissioners although the first argument to which I have referred did not—that the children of the marriage represent the class whose interest comes within the terms of section 32 of the Trustee Act, 1925. Section 32 (1) (*c*) provides that where there is a prior life or other interest which would be prejudiced if the advancement were made no such advance payment shall be made. That argument cannot succeed because, as I indicated in my analysis of the trusts in clauses 3 and 4 of the settlement, as regards two-thirds of the capital and the accompanying income the first interest is the interest of the beneficiary. Therefore, I cannot see, as regards her share, how the interest of the possible children—there are none at present—can be regarded as a prior interest at all. They only have a contingent interest which is subject to her first interest, and to that extent it seems to me that it would be impossible for the argument to succeed.

I will deal with the third point, which was taken here and not before the special commissioners, and only briefly. The argument was based on the theory that from a given time—which I gather is still in the future—the beneficiary might be past the age of child-bearing, but that if she had children they would be the only ascertainable persons, other than her sister, who could give their consent, and that if they and her sister did so a situation would arise in which in certain circumstances (relying of course on the wide words of section 405 (2) of the Income Tax Act, 1952), section 32 would operate, assuming, of course, that it applied to the present settlement. That argument cannot succeed because for the purposes of the rule against perpetuities—and it would appear also from the law relating to accumulations—a woman is not treated as being no longer able to bear children, whatever her age. It is quite true that the Chancery Division as a matter of practical administration, upon being satisfied that by reason of age or for medical reasons a woman is incapable of child-bearing, will allow the distribution of a fund, thus exonerating the trustees of a will or settlement from what otherwise might be a breach of trust. But in a technical matter such as this, it would not be right to invoke such a rule of administration in order to aid the Inland Revenue to claim payment of tax in circumstances which are still highly hypothetical. That view seems to me to be supported by *In re Dawson*,[5] *In re Deloitte* [6] and *In re Hocking*.[7] It is perfectly true that doubts may have been cast on the decision in *In re Deloitte* [8] but from *Berry* v. *Geen*,[9] at any rate, it is quite plain that *In re Dawson* [10] and *In re Deloitte* [11] are binding on me. Consequently, this appeal fails, though not for the reason upon which the commissioners relied.

Appeal dismissed with costs.

Solicitors: *Solicitor, Inland Revenue; Gouldens.*

M. G. T.

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[5] (1888) 39 Ch.D. 155.
[6] [1926] Ch. 56, 65.
[7] [1898] 2 Ch. 567 (C.A.).
[8] [1926] Ch. 56.
[9] [1938] A.C. 575, 584; 54 T.L.R. 703; [1938] 2 All E.R. 362 (H.L.).
[10] 39 Ch.D. 155.
[11] [1926] Ch. 56.

In re NEELD, DECD.
CARPENTER *v.* INIGO-JONES AND OTHERS.

[1959 N. No. 674.]

1960
Feb. 24, 25, 26;
March 1, 2, 3, 4.

Cross J.

Name and Arms Clause—Condition subsequent—Uncertainty—Direction to take and "use upon all occasions" surname.
Name and Arms Clause—Public policy—Unlikelihood of clause applying to married woman.
Will—Construction—Omission—Filled by reference to words in subsequent clause—Name and arms clauses.
Administration—Time when beneficiary entitled to payment—Income—Residue—Specific devise—When beneficiary "entitled to actual "receipt of yearly" income.

By his will dated January 12, 1952, the testator, Lionel William Neeld, devised certain specifically named freehold properties upon trust for his grandson, Ian Spencer Horne, for life with remainder to his sons in tail male, with remainder to the daughter of the testator, and on her death upon the trusts of his residuary estate. By clause 17 he directed that any person, other than his daughter, "who . . . shall become entitled to the actual receipt of the yearly "rents and profits" of those properties "and who shall not then use "the surname of Inigo-Jones," or, if an infant, within one year of attaining 21 years, "take upon himself and use upon all occasions "the surname of Inigo-Jones only and quarter the arms of Inigo-"Jones with his or her own family arms and shall within the space "of one year next after the period hereinbefore prescribed apply for "and endeavour to obtain a proper licence from the Crown or "take such other means as may be requisite to enable him or her "to take use and bear the surname of Inigo-Jones only and arms of "Inigo-Jones and in case any of the said persons . . . shall refuse "or neglect or discontinue to take or use such surname and "arms . . . after the expiration of the said space of one year the "use and estate hereby limited . . . shall absolutely cease," and the properties should devolve as though the person concerned, being a tenant for life, were dead, or being tenant in tail, were dead and without heirs: that provision was not to apply if the properties devolved on any person entitled to the residuary estate.

By clause 14 the testator devised and bequeathed his net residuary estate, in the events which happened, to his brother, Ralph Christopher Inigo-Jones, with remainder to the son of his brother, with remainder to another brother and to his son in tail male, with remainder to the sons and daughters of his daughter in tail general with an ultimate remainder for the persons entitled under the Administration of Estates Act, 1925. Clause 14 also provided that "the name and arms clause contained in the will of Joseph Neeld "shall be applicable to this my will so far as my residuary estate is "concerned and shall apply to any person taking the income of my "net residuary estate." That clause provided that "every person "who under the trusts of this my will shall become entitled to the "actual receipt of the yearly rents and profits" of the property thereby devised "and who shall not then use the surname of 'Neeld' "and bear the arms of 'Neeld' and the respective husbands of . . . "females shall within the space of one year next after he or she "shall so become entitled as aforesaid or if an infant . . . within "the space of one year" of attaining 21 "take upon himself "or herself and use upon all occasions the name of 'Neeld' only "and quarter the arms of 'Neeld' with his or her own family "arms and shall within the space of one year next after the periods "hereinbefore prescribed apply for and endeavour to obtain an Act "of Parliament" or take such other requisite steps "to enable him "or her to use and bear the surname of 'Neeld' only and arms of "'Neeld' and in case any of the said persons shall refuse or neglect "or discontinue to take or use such surname and arms" or to take the requisite steps "after the expiration of the said space of one "year the use and estate hereby limited to the person who or whose "husband shall so refuse neglect or discontinue as aforesaid . . . "shall absolutely cease" and the property should devolve as though the person concerned, being a tenant for life, were dead, or being a tenant in tail, were dead and without heirs.

The testator died on October 3, 1956, leaving estate comprising both realty and personalty. His will was proved on October 30, 1957, and in 1958 his widow began proceedings under the Inheritance (Family Provision) Act, 1938. Neither the brother nor the grandson of the testator had taken any steps to change their names but the executor had paid £800 to the grandson at his request on account of the rents received by them from the specifically devised properties. In the course of administration, before any assents had been made or the net residue ascertained, the executor took out a summons to determine, inter alia, whether the Inigo-Jones and the Neeld name and arms clauses were valid and binding on the testator's grandson and brother respectively, or whether they were void for uncertainty or as being contrary to public policy, and, if valid, whether the interests had determined:—

Held, (1) that the Inigo-Jones clause was substantially a reproduction of the Neeld clause, so that if it were not intelligible as it stood words could be added from the Neeld clause to make it so, and that, on their construction, only one period of 12 months within which the name and arms must be taken was intended by each clause, and discontinuance of the specified name and arms at any time, even after the end of the 12 month period, would work a forfeiture.

(2) (a) That the words "discontinue to . . . use" referred back to the earlier words "use on all occasions," which meant that the beneficiary must use the surname on all occasions when he would ordinarily use a surname, and that, accordingly, neither clause was void for uncertainty (post, pp. 466, 467).

In re Drax (1906) 22 T.L.R. 343 followed.

(b) That the fact that a devise might be invalid so far as it applied to married women and their husbands was not a sufficient reason for holding it totally void as applied to males and spinsters, and that as the beneficiaries under the Inigo-Jones clause were exclusively male and it was only in remote and improbable contingencies that the Neeld clause would affect females, neither clause was contrary to public policy. Both clauses therefore were valid and binding (post, p. 467).

In re Kersey [1952] W.N. 541 distinguished.

(3) That a life tenant entitled to a composite gift of residuary realty and personalty subject to the payment of debts and legacies did not become entitled to the residue of the income of the net residuary estate until the residue had been ascertained in due course of administration, and that since the net residue had not yet been ascertained, the 12 month period had not begun to run against the brother of the testator and there was no forfeiture (post, p. 470).

(4) That a life tenant of realty specifically devised by a will made since the passing of the Land Transfer Act, 1897, had a vested interest in the yearly rents and profits and became equitably entitled to them as they accrued as from the date of the death of the testator; that notwithstanding the possibility of defeasance by the payment of debts or the satisfaction of the widow's application under the Inheritance (Family Provision) Act, 1938, the grandson

became "entitled to the actual receipt of the yearly rents and "profits" within the meaning of clause 17 on the testator's death, and that, accordingly, more than 12 months having elapsed since that date, there had been a forfeiture of his interest (post, pp. 473-475 et seq.).

In re Varley (1893) 68 L.T. 665 applied.

In re Simson [1950] Ch. 38; 65 T.L.R. 721; [1949] 2 All E.R. 826 considered.

ADJOURNED SUMMONS.

The testator, Lionel William Neeld, made his will on January 12, 1952. By clause 3 of his will he devised certain freehold property, described as West and East Foscote farms and woodlands, and a freehold residence, Crowdown, on the following trusts: As to the Foscote farms and woodlands, on trust for his grandson, Ian Spencer Horne, during his life and after his death on trust for his first and other sons successively in tail male and upon failure of such issue on trust for his daughter, Mrs. Margaret Evelyn Whiting, for life and on her death on trust for her other sons in tail male and on failure of such issue on the trusts of his residuary estate: As to the residence Crowdown, on trust for his daughter, Mrs. Margaret Evelyn Whiting, during her life and after her death on trust for his grandson, Ian Spencer Horne, during his life and after his death on trust for his first or other sons successively in tail male and on failure of such issue on trust for the other sons of Mrs. Whiting in tail male and upon failure of such issue upon the trusts of his residuary estate.

Clause 17 was in the following terms: "I expressly direct "that any person (with the exception of my daughter the said "Margaret Evelyn Whiting) who under the trusts of this my "will shall become entitled to the actual receipt of the yearly "rents and profits of the Foscote farms and woodlands and or "to Crowdown and who shall not then use the surname of Inigo-"Jones or if an infant shall so become entitled then within the "space of one year next after he or she shall have attained the "age of twenty-one years take upon himself and use upon all "occasions the surname of Inigo-Jones only and quarter the arms "of Inigo-Jones with his or her own family arms and shall within "the space of one year next after the period hereinbefore pre-"scribed apply for and endeavour to obtain a proper licence from "the Crown or take such other means as may be requisite to "enable him or her to take use and bear the surname of Inigo-"Jones only and arms of Inigo-Jones and in case any of the said "persons (with the exception only of my daughter the said

"Margaret Evelyn Whiting) shall refuse or neglect or discontinue "to take or use such surname and arms and to take such means "as may be requisite for the purpose of taking or using the same "then after the expiration of the said space of one year the use "and estate hereby limited to the person who shall so refuse "neglect or discontinue as aforesaid and also the limitation here-"inbefore contained to the use of the said trustees their executors "administrators and assigns during the life of such person in "case he or she shall be tenant for life of the said Foscote farms "and woodlands and or Crowdown shall absolutely cease and "immediately thereupon the said Foscote farms and woodlands "and or Crowdown shall go over to the uses and in the manner "to and in which the same would have gone if the person who "shall so refuse or neglect or discontinue as aforesaid being "tenant for life of the Foscote farms and woodlands and or "Crowdown were then actually dead or being tenant or tenants "in tail male were then dead without heirs inheritable under "the same entail but I direct that this provision shall not apply "if the Foscote farms and woodlands and or Crowdown shall "devolve on any person then entitled to my residuary estate as "hereinbefore appearing."

By clause 14 of his will the testator devised and bequeathed his net residuary estate upon trust, in the events which happened, to his brother, Ralph Christopher Inigo-Jones, during his life, with remainder to Ralph William Inigo-Jones for life, with remainder to the sons of Ralph William Inigo-Jones in tail male, and on the failure of such issue upon trust for his brother Henry Richmond Inigo-Jones for life, with remainder to John Richmond Inigo-Jones during his life, with remainder to the sons of John Richmond Inigo-Jones in tail male, with remainder to the sons of Mrs. Whiting in tail male, with remainder to her sons successively in tail general, with remainder to her daughters in equal shares and as tenants in common in tail general; if there were a failure of issue of any daughter of Mrs. Whiting, then her share, both original and accruing, was to be held on trust for the other daughters equally as tenants in common in tail general; if all except one of the daughters should die without issue, or if there were only one daughter, then, as to the whole of the premises, on trust for that daughter in tail general with an ultimate remainder for the persons who would be entitled to the testator's estate under the Administration of Estates Act, 1925, if he had died intestate domiciled in England without leaving a wife surviving him.

Clause 14 continued "provided expressly that the name and arms "clause contained in the will of the said Joseph Neeld [from "whom the testator had inherited the Grittleton estate] shall "be applicable to this my will so far as my residuary estate is "concerned and shall apply to any person taking the income of "my net residuary estate."

The name and arms clause in the will of Joseph Neeld was in the following terms: "Provided also that every person who "under the trusts of this my will shall become entitled to the "actual receipt of the yearly rents and profits of the said manors "and other freehold premises hereinbefore devised and who shall "not then use the surname of 'Neeld' and bear the arms of "'Neeld' and the respective husbands of such of them as are "or shall be females shall within the space of one year next after "he or she shall so become entitled as aforesaid or if an infant "shall so become entitled then within the space of one year next "after he or she shall have attained the age of 21 years take "upon himself or herself and use upon all occasions the surname "of 'Neeld' only and quarter the arms of 'Neeld' with his or "her own family arms and shall within the space of one year "next after the periods hereinbefore prescribed apply for and "endeavour to obtain an Act of Parliament or a proper licence "from the Crown or take such other means as may be requisite to "enable him or her to take use and bear the surname of 'Neeld' "only and arms of 'Neeld' and in case any of the said persons "shall refuse or neglect or discontinue to take or use such surname and arms and to take such means as may be requisite for "the purpose of taking or using the same then after the expiration of the said space of one year the use and estate hereby "limited to the person who or whose husband shall so refuse "neglect or discontinue as aforesaid . . . shall absolutely cease "and immediately thereupon the said manors and freehold premises shall go over to the uses and in the manner to and in "which the same would have gone if the person who or whose "husband shall so refuse neglect or discontinue as aforesaid and "being tenant for life of the said manors and freehold premises "were then actually dead or being tenant or tenants in the "tail male or in tail general were then dead and without heirs "inheritable under the same entail."

The testator died on October 3, 1956, survived by his widow, and leaving residuary estate comprising both realty and personalty. He had one child, his daughter, Mrs. Margaret Evelyn

Whiting, who was the mother of Ian Spencer Horne, who had three infant children, Anthony Lionel Spencer Horne, Randall Horne and Melaine Margaret Lilian Horne. The testator had two brothers, Ralph Christopher Inigo-Jones, the father of Ralph William Inigo-Jones, and Henry Richmond Inigo-Jones, who had a son, John Richmond Inigo-Jones, neither of the latter being parties to the summons.

The testator's will was proved on October 30, 1957, and in 1958 his widow began proceedings under the Inheritance (Family Provision) Act, 1938. In 1958 the executor paid £800 to Ian Spencer Horne at his request on account of the rents received from the specifically devised properties. Ian Spencer Horne had not taken the name and arms of Inigo-Jones, nor had Ralph Christopher Inigo-Jones taken the name of Neeld, and before the net residue had been ascertained or any assents made the surviving executor took out a summons for the determination, inter alia, of the following questions: 1 (a) Whether the provisions in clause 14 of the testator's will incorporating the name and arms clause in the will of Joseph Neeld was binding on the defendant Ralph Christopher Inigo-Jones or whether it was void for uncertainty or as being contrary to public policy; (b) if it were valid and binding, whether the prescribed periods commenced with the date of the testator's death or the date of an assent to the defendant; (c) if the prescribed periods began with the date of the testator's death whether, in the events which had happened, the interest of the defendant in the testator's residuary estate had determined. 2 (a) Whether the provisions in clause 17 as to the assumption of the name and arms of Inigo-Jones were binding on the defendant Ian Spencer Horne, or whether they were void for uncertainty or as being contrary to public policy; (b) if they were valid and binding, within what period the defendant was bound to comply with them; (c) if the period began with the date of the testator's death, whether the interest of the defendant in the Foscote farms and woodlands had determined.

The following argument was heard on questions 1 (a) and 2 (a).

N. S. S. Warren Q.C. for the executor.

R. S. Lazarus Q.C. and *T. A. C. Burgess* for Ian Spencer Horne, the third defendant, his three infant children, the fourth, fifth and sixth defendants, and Mrs. Margaret Evelyn Whiting, the seventh defendant. The provisions of clause 14 incorporating the name and arms clause in the will of Joseph Neeld (the "Neeld clause") are binding on Ralph Christopher Inigo-Jones. Starting with *In re Fry*,[1] there have been seven recent cases on name and arms clauses, in all of which the clause has been held invalid. Only the latest of these, *In re Murray*,[2] has reached the Court of Appeal, and the clause was there held invalid for reasons of construction peculiar to the case. That case is not, therefore, an authority for the present case. Moreover, the Court of Appeal deliberately left open the question whether the earlier modern decisions had been validly decided. In the present case the material expressions are "take upon himself . . . and use "upon all occasions" and "discontinue to use." The phrase "discontinue to use and bear" did not render the clause invalid in *In re Cornwallis*,[3] but in *In re Wood's Will Trusts*,[4] following *In re Bouverie*[5] and *In re Kersey*,[6] name and arms clauses containing the word "discontinue" were held invalid. However, the present case is distinguishable, because here "discontinue" is the antithesis of "use upon all occasions" and is certain in its meaning. Nor is it confined to discontinuance in the first year alone. Name and arms clauses on lines similar to the Neeld clause were upheld over a long period. Such clauses were based upon precedents of conveyancing authorities of repute: see Davidson's Precedents, 2nd ed., vol. 4, p. 337, and Key & Elphinstone's Precedents in Conveyancing, 14th ed., vol. 2, p. 733. [Reference was also made to Jarman on Wills, 8th ed., vol. 2, pp. 1534 et seq.] *In re Drax*[7] is an example of the upholding of a name and arms clause very similar to the Neeld clause and is authority for this case. There is only a remote possibility of a female becoming entitled under clause 14, so that the clause is not contrary to public policy.

On the other hand, clause 17 is not binding on Ian Spencer Horne. It is unintelligible as it stands. The court will not supply missing words to prevent a vesting (*In re Litchfield*[8]), and it should not do so to aid a divesting. See also *In re Murray*.[9]

John Bradburn for Ralph Christopher Inigo-Jones and Ralph

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[1] [1945] Ch. 348; 61 T.L.R. 449; [1945] 2 All E.R. 205.

[2] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129, C.A.

[3] (1886) 32 Ch.D. 388.

[4] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[5] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[6] [1952] W.N. 541.

[7] (1906) 22 T.L.R. 343.

[8] (1911) 104 L.T. 631.

[9] [1955] Ch. 69.

William Inigo-Jones, the first and second defendants. Clause 17 is grammatical and intelligible as it stands; it takes the form of an express provision introduced and governed by the words "I "expressly direct that . . . ," and therefore the omission of "shall" or "do" before "take" is immaterial. The "period "hereinbefore prescribed" means the time of becoming entitled, so that an adult has one year in which to apply for formal authority to bear the name and arms of Inigo-Jones, although the name can be borne without such authority. The omission of words corresponding to "and bear the arms of 'Neeld' . . . become "entitled as aforesaid" which appear in the Neeld clause is not fatal to the validity of the clause: *In re Murray.*[10] Moreover, the clause is not contrary to public policy, since the only possible female beneficiary, Mrs. Whiting, is excepted from its operation.

On the other hand, the provision of clause 14 incorporating the Neeld clause takes the form of a proviso and is not binding on the first defendant. Such a proviso is treated as a condition subsequent and is strictly construed. The use of the plural "periods" renders it uncertain whether the beneficiaries have one or two years in which to comply with the clause. If *In re Drax*[11] had occurred after *Sifton* v. *Sifton*[12] and *Clayton* v. *Ramsden*[13] it might have been differently decided. A forfeiture is expressed to operate "after the expiration of . . . one year" whether the cause of forfeiture is a failure to take and bear the name and arms or a discontinuing to use them, and this is fatal. *In re Drax*[14] is in any event distinguishable, since there the direction was to "use in all deeds . . . and upon all other occa"sions," to be construed ejusdem generis, thus limiting use to formal occasions. [Reference was made to *In re Fry.*[15]] Since it is possible that a female will benefit under clause 14, the Neeld clause is contrary to public policy: *In re Kersey.*[16]

W. J. C. Tonge for Celia Kathleen Mary Neeld, the eighth defendant, a legatee.

February 26. CROSS J. The first two questions in this originating summons relate to the validity and the effect of the name and arms clauses contained in the will, dated January 12, 1952, of Lionel William Neeld who died on October 3, 1956.

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[10] [1955] Ch. 69, 79.

[11] 22 T.L.R. 343.

[12] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435, P.C.

[13] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

[14] 22 T.L.R. 343.

[15] [1954] Ch. 348.

[16] [1952] W.N. 541.

The testator's name was originally Inigo-Jones but he changed it to Neeld in 1941 on inheriting the Grittleton Estate which was settled by the will of Joseph Neeld made on May 28, 1855. The testator had only one child, a daughter, Mrs. Margaret Evelyn Whiting, the seventh defendant; and the third defendant, Ian Spencer Horne, is her son by her first marriage. He has three children, two of whom are sons, who are the fourth, fifth and sixth defendants. The testator had two brothers, Ralph Christopher Inigo-Jones, the first defendant, who has a son, Ralph William Inigo-Jones, who is the second defendant, and another brother, Henry Richmond Inigo-Jones, who has a son, John Richmond Inigo-Jones.

[His Lordship read the provisions of the will set out above, observed that under the settlement of the specifically devised property in clause 3 the successive beneficiaries, apart from the daughter, Mrs. Whiting, were exclusively male, and that under the trusts of clause 14 there was a remote possibility of female issue of the daughter becoming entitled to the property, and continued:] It is clear that clause 17 is substantially a reproduction of the "Neeld" name and arms clause with the substitution of Inigo-Jones for Neeld. But after the words "the surname of "Inigo-Jones" in clause 17 there are no words corresponding to the words "and bear the arms of 'Neeld' and the respective "husbands of such of them as are or shall be females shall within "the space of one year next after he or she shall so become "entitled as aforesaid" which appear in the Neeld name and arms clause. The omission of the reference to husbands is, of course, reasonable enough, since there are no female beneficiaries under clause 3 other than Mrs. Whiting, who is expressly excluded from the operation of the name and arms clause. But Mr. Lazarus has argued that the omission of the other words makes clause 17 unintelligible and that I cannot supply the missing words. On the other hand, Mr. Bradburn has argued that the clause is in fact intelligible as it stands, and I think that this is so. But, in any case, it seems to me that it is quite obvious what the missing words are and that I can supply them from the Neeld clause. In *In re Murray* [1] Evershed M.R. pointed out [2] that it would not be right for the court to read words into a forfeiture clause in order to effect a forfeiture if it felt any doubt as to the words which should be read in and that it could and should do so only if it felt no doubt. Here, supposing that in fact it is necessary to read words in to make sense of the clause, I have not the least doubt what the words are. Another point of difference between the two wills which has been relied on is that whereas in the Neeld clause the plural " periods " is used, in the phrase referring to the obtaining of an Act of Parliament or licence from the Crown, in clause 17 the singular " period " is used. It was suggested that the use of the plural in the Neeld clause made it uncertain whether the beneficiaries had one or two years within which to take the name and arms in question. In my judgment, it is clear that only one period of 12 months is referred to in either clause. The use of the plural in the Neeld clause can readily be explained because in the case of adults the one-year period runs from the date of their becoming entitled in possession, whereas in the case of infants it runs from the attainment of 21. Therefore, in my judgment, it is just as sensible and accurate to use the plural as the singular, and I do not think this difference between the two clauses is really material.

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[1] [1955] Ch. 69; [1954] 3 W.L.R. 521; [1954] 3 All E.R. 129.

[2] [1955] Ch. 69, 79, 80.

A further question of construction which was the subject of some discussion is whether a forfeiture under these clauses is only caused by a discontinuance of user within the one-year period or whether a discontinuance at any time would work a forfeiture. The former construction would be so ridiculous that even apart from authority I think that I would have held that the clause covered a discontinuance at any time although the words " or " immediately after such discontinuance as aforesaid, as the case " may be," which appear in Davidson's Precedents, 2nd ed. (1861), vol. 4, at p. 337, do not appear after the words " after the " expiration of the said space of one year " in these clauses. But in *In re Drax*,[3] where the name and arms clause was in substantially the same terms as the clauses which I have to consider, this very point was raised, and Swinfen Eady J. held that discontinuance of user at any time even after the one-year period would work a forfeiture.

I must therefore now consider whether either clause, as I have construed it, is invalid. The authorities on the subject are in a most unsatisfactory state. Name and arms clauses in much the same form as these were of frequent occurrence in the nineteenth century settlements of landed estates and no one challenged their validity. Recently, however, partly, I think, because of the decisions of the Privy Council in *Sifton* v. *Sifton*[4] and of the House of Lords in *Clayton* v. *Ramsden*,[5] which emphasised the necessity for certainty and precision of language in defeasance clauses, and partly, I think, because a name and arms clause seems to be a relic of a bygone age, judges of first instance have sometimes held void a clause which judges of an earlier period would probably have regarded as free from ambiguity and unquestionable.

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[3] (1906) 22 T.L.R. 343.

Examples are the decision of Vaisey J. in *In re Bouverie*,[6] Wynn-Parry J. in *In re Wood's Will Trusts*[7] and Danckwerts J. in *In re Kersey*.[8] On the other hand, in *In re Murray*[9] to which I have referred, Upjohn J. held that a name and arms clause in a somewhat unusual form was valid, and the Court of Appeal, although it reversed his decision by reason of some ambiguity in the particular words of that clause, pointedly refrained from expressing either approval or disapproval of the three other decisions to which I have referred.

The position, therefore, is that if the clauses before me are indistinguishable from those considered in those three cases, then I ought to hold them void. On the other hand, I have no encouragement from the Court of Appeal to extend those cases to cover clauses which are distinguishable from those which were there considered.

The first objection to these clauses which is taken is that the words " use " and " discontinue to use " are not sufficiently precise. In *In re Bouverie*[10] Vaisey J. held that the word " disuse " was not of the high degree of certainty and precision which was required in a condition subsequent, and in *In re Wood's Will Trusts*[11] Wynn-Parry J. held that if the word " disuse " was too vague, the phrase " discontinue to use " must also be too vague. But here the wording is not " use " simpliciter but " use upon all " occasions." I think that the later words " discontinue to use " obviously refer back to the earlier phrase and mean " discontinue " to use on all occasions." Even apart from authority I should have no doubt that the expressions " use upon all occasions " and " discontinue to use on all occasions " were sufficiently certain, but, in fact, in my judgment, this point, too, is covered by the decision of Swinfen Eady J. in *In re Drax.*[12] There the words in question were " take upon . . . herself and use in all deeds and " writings to which . . . she shall be a party or which . . . she shall " sign, and upon all other occasions the surnames of Erle and " Drax." Swinfen Eady J. held that those words meant that the surname must be used on all occasions when a surname is ordinarily used. He pointed out that, of course, that would not compel the beneficiaries to use a surname when he or she would ordinarily use a christian name.

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[4] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435, P.C.

[5] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16, H.L.

[6] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[7] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[8] [1952] W.N. 541.

[9] [1955] Ch. 69.

[10] [1952] Ch. 400.

[11] [1952] Ch. 406.

Mr. Bradburn submitted to me that I ought to draw a distinction between that case and this case. There the words were " use in all deeds . . . and upon all other occasions," so that an ejusdem generis construction might be possible, whereas here the words were " use upon all occasions." But that, in my judgment, is altogether too great a refinement. I do not think Swinfen Eady J. would have come to any different conclusion in that case if the words had been simply " upon all occasions." In this case, as in that, I think it means that the beneficiary must use the surname on all occasions when he ordinarily would use a surname.

The second objection which is taken to the validity of clause 14 of the will is based upon the decision of Danckwerts J. in *In re Kersey.*[13] There the beneficiary who was immediately affected by the clause was a married woman, and the clause extended to husbands of married women and purported to require them to change their names. Danckwerts J. held that a provision requiring the husband of a married woman to change his name under penalty of his wife losing some property was contrary to public policy. Of course, I would follow that decision without hesitation if I thought it applied to this case, but here the beneficiary who is immediately affected is the first defendant, Ralph Christopher Inigo-Jones, and it is only in very improbable and remote contingencies that any female can possibly be affected at all. I do not think the fact that a clause may be invalid so far as it applies to married women and their husbands is any sufficient reason for holding it totally void even as applied to males or spinsters.

In this connection I observe that the clause in *In re Murray*[14] which Upjohn J. held to be valid applied to married women although the beneficiary who was actually affected at the time was a male. Upjohn J. evidently did not consider that the circumstance that the clause extended to a married woman was any objection to its application to the facts before him. It is true that the Court of Appeal [15] reversed the judgment, but they did that on quite different grounds, and there is no suggestion in their judgment that Upjohn J. was wrong in not holding the whole clause void because of its possible application to married women.

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[12] 22 T.L.R. 343.

[13] [1952] W.N. 541.

[14] [1955] Ch. 69.

I have no particular affection for name and arms clauses. If some higher court is prepared to say that nowadays no such clauses are capable of having any legal effect, I shall not shed any tears, but I could not take so robust a course myself even if I wanted to do so. I have to be satisfied that the particular clauses before me, reasonably construed, are open to some real, not fanciful, objection on the ground either of uncertainty or of public policy. So far as concerns uncertainty, the cases of *In re Bouverie* [16] and *In re Wood's Will Trusts* [17] are plainly distinguishable, whereas the case of *In re Drax*,[18] in my judgment, is indistinguishable. I can see no real uncertainty in this clause, and, as I have said, I am not prepared to hold that the Neeld clause is wholly bad on grounds of public policy because of the remote possibility of a married woman becoming entitled to an interest in the residuary estate. Therefore, I shall declare that these clauses are valid.

The following argument was heard on question 1 (b).

R. S. Lazarus Q.C. and *T. A. C. Burgess* for the third, fourth, fifth, sixth and seventh defendants. Ralph Christopher Inigo-Jones became entitled to the income of the net residuary estate on the death of the testator, and since he has failed to comply with the Neeld clause he has forfeited his interest: *In re Varley.*[1]

John Bradburn for the first and second defendants. *In re Varley* [1] is distinguishable; it was a case of a specific devise before the Land Transfer Act, 1897. The necessary assents have not yet been made, nor has the net residue been ascertained, and Ralph Christopher Inigo-Jones has therefore no legal or equitable right to the income as it accrues: *Corbett* v. *Inland Revenue Commissioners.*[2]

CROSS J. The question which now arises is whether Ralph Christopher Inigo-Jones has forfeited his life interest in the residuary estate by failing to take the name and arms of Neeld within one year from the testator's death. Under clause 14 of the will the testator devised and bequeathed all the residue of his estate both real and personal subject to the payment out of his personal estate or in case of deficiency thereof out of his real estate of his funeral and testamentary expenses and debts and the legacies and the annuities bequeathed by the will or any codicil thereto and all death duties upon trust for Ralph Christopher Inigo-Jones for life. On the death of the testator all his property both real and personal vested in the surviving executor.

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[15] [1955] Ch. 69.
[16] [1952] Ch. 400.
[17] [1952] Ch. 406.
[18] 22 T.L.R. 343.

[1] (1893) 68 L.T. 665.
[2] [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700; 21 T.C. 449, C.A.

The administration of the estate is not yet completed and so far no payment on account of income has been made to the first defendant. In due course, after the administration has been completed, the executor will execute an assent in favour of the first defendant in respect of the residuary realty and an assent in respect of the residuary personalty in favour of the trustees, but all that is in the future. The proviso in clause 14 which introduces the name and arms clause provides that the clause contained in the will of Joseph Neeld shall be applicable to the testator's will. The opening words of the Neeld clause are: "Provided also that every person who under the trusts of this "my will shall become entitled to the actual receipt of the yearly "rents and profits of the said manors and other freehold premises "hereinbefore devised and who shall not then use the surname "of 'Neeld.' . . ." Applying that clause mutatis mutandis to the gift of residue, I think that an obligation is imposed on the first defendant to take the name and arms within one year from the time when he becomes entitled to receive the income of the residuary estate. The question is, has he yet so become entitled? I think not.

Mr. Lazarus has referred me to *In re Varley*,[1] where the testator specifically devised certain real property to his trustees upon trust to receive rents and to permit his wife to reside in the mansion house, and subject thereto to stand possessed of the estate in question in trust for a certain life tenant with remainder over. He directed that every person who, under the foregoing trusts, should become entitled as tenant for life or in tail to the actual possession of the rents and profits of the E. estate, and who should not then use and bear the name of Varley, should within one year after he should so become entitled take upon himself and use the name of Varley together with his or her own

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[1] 68 L.T. 665.

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family surname. North J. held that the year in question began to run against the life tenant of the specifically devised property on the death of the testator. But that was a case of a specific devise before the Land Transfer Act, 1897, and I do not think that the same considerations apply to a composite gift of residuary realty and personalty subject to the payment of debts, legacies and so on. In such a case I do not think that the life tenant of residue can be said to be entitled to the income of the net residuary estate until the residue has been ascertained in due course of administration and the necessary assents made.

The following argument was heard on question 2 (b) and (c).

John L. Knox for the third defendant. Ian Spencer Horne is tenant for life of the property devised by clause 3, but it has hitherto been impossible for him to insist on a vesting assent being made in his favour. The property included in the specific devise has only just been ascertained by this summons and the accounts show that administration is not yet complete. Further, it is possible that the court in the application by the testator's widow under the Inheritance (Family Provision) Act, 1938, might award her a life interest in the whole of the specifically devised property; the order would be deemed to have been written into the will and so have effect from the date of the testator's death. See also the remarks of Vaisey J. in *In re Simson.*[1]

Section 43 (1) of the Administration of Estates Act, 1925, under which the executors have acted in paying £800 to Ian Spencer Horne on account, is permissive, and the definition of "possession" in section 55 (1) (xii) of that Act extends to letting a beneficiary have possession of some of the rents and profits. This is, however, a different matter from a beneficiary's being in a position lawfully to demand all the net rents, which is the meaning of being entitled to the "actual receipt of the yearly "rents and profits." Some meaning must be attributed to "actual." It emphasises that the propositus must be able to demand the rents and profits, and it indicates physical as opposed to notional possession. [Reference was made to *In re Petre's Settlement Trusts.*[2]] *Hogg* v. *Jones*,[3] referred to in *In re Varley*,[4] was overruled in *In re Duncombe.*[5] [Reference was also made to *In re Edwards*[6] and *Leslie* v. *Rothes (Earl).*[7]]

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[1] [1950] Ch. 38; 65 T.L.R. 721; [1949] 2 All E.R. 826.

[2] [1910] 1 Ch. 290.

[3] (1863) 32 Beav. 45.

[4] (1893) 68 L.T. 665.

[5] [1932] 1 Ch. 622, C.A.

[6] [1910] 1 Ch. 541; 26 T.L.R. 308.

[7] [1894] 2 Ch. 499, C.A.

R. S. Lazarus Q.C. and *T. A. C. Burgess* for the fourth, fifth, sixth and seventh defendants. Ian Spencer Horne has forfeited his interest. The word "actual" is explained by *In re Petre's Settlement Trusts.*[8] Clause 17 has been held to have been taken substantially from the will of Joseph Neeld, and the phrase "entitled to the actual receipt of the yearly rents and profits" must mean the same as it meant when that will was made. Its construction is not altered by any intervening change in the law such as was made by the Land Transfer Act, 1897. "Entitled" means entitled under the will without regard to extrinsic circumstances. Reliance is placed on the judgment of Romer L.J. in *In re Duncombe.*[9]

An award under the Inheritance (Family Provision) Act, 1938, is not one of the trusts of the will but is extrinsic to them. The words in the Act of 1938 "as if (the will) had been executed "with" the variations specified in the order, have been replaced by "subject to" by the Third Schedule to the Intestates' Estates Act, 1952. *In re Varley*[10] shows that a beneficiary may be "in "actual possession" of the rents although he receives nothing. An award under the Inheritance (Family Provision) Act, 1938, would be a periodical payment more in the nature of the charge in *In re Varley*[10] than of the rents themselves or of a share of the rents.

Ian Spencer Horne has an interest under the will vested in possession but liable to be divested. As devisee of a specific devise he is entitled, until a divesting takes place, to the rents and profits as from the testator's death: Jarman on Wills, 8th ed., vol. 2, p. 939, and *Andrew* v. *Andrew.*[11] An award under the Inheritance (Family Provision) Act, 1938, could at most cause a divesting. So also, if resort was had to the specific devise for the payment of debts, although in fact there has never been such a deficiency of assets that any question arose whether or not such resort might be necessary.

March 3, 1960. CROSS J. read the following judgment: By the two name and arms clauses contained in clauses 14 and 17 of his will the testator provided that Ian Spencer Horne and Ralph Christopher Inigo-Jones must make up their minds whether or not to comply with the conditions imposed within a year from the time when they should respectively become entitled under the trusts of the will to the actual receipt of the rents and profits or income of the properties in which they were respectively given life interests.

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[8] [1910] 1 Ch. 290.

[9] [1932] 1 Ch. 622, 638, C.A.

[10] 68 L.T. 665.

[11] (1875) 1 Ch.D. 410, C.A.

The property of which Ralph Christopher Inigo-Jones was given the income for his life is described by the testator in clause 14 as being the net residuary estate. The net residue has not yet been ascertained and being non-existent cannot produce any income. When the administration is completed Ralph Christopher Inigo-Jones may become entitled to be paid by the executor some sum in respect of income received by the executor during the administration period, but such income is not income to which he has any legal or equitable title as it accrues: *Corbett* v. *Inland Revenue Commissioners.*[1] Accordingly, as I have already said, I do not think that there can as yet be any question of Ralph Christopher Inigo-Jones having forfeited his life interest by failure to comply with the name and arms clause.

The position of Ian Spencer Horne is very different, since he is given an equitable life interest in possession in the Foscote farm and woodlands under a specific devise. There can, I think, be no doubt that had the law remained the same as it was before the Land Transfer Act, 1897, he would have become on the death of the testator entitled to the actual receipt of the rents and profits of the properties in question within the meaning of the name and arms clause: *In re Varley.*[2] The legal estate would have passed on the death of the testator to the trustees under the specific devise, and the life tenant would have at once acquired a right in equity to be paid the rents and profits. It is true that the creditors of the testator could have taken administration proceedings for the purpose of making the specifically devised realty available for the payment of their debts, but this possibility would not have prevented the equitable life tenant from becoming on the death entitled to the actual receipt of the rents and profits.

The question which I have to decide is whether the same result ensues today in view of the changes which have been made in the law since *In re Varley*[2] was decided. On the death of the testator in 1956 the legal estate in the specifically devised property vested in the executor who could have sold it, if necessary, for the payment of debts. Ian Spencer Horne is a tenant for life within the meaning of the Settled Land Act, 1925, and subject to the executor's rights and powers for the purpose of administration the executor must, when required to do so, execute a vesting assent in his favour: section 6 (*b*) and section 8 (3) (*a*) of the Settled Land Act, 1925. The fact that all estate duty payable on the testator's death in respect of the property has not yet been paid does not justify the executor refusing to execute an assent if reasonable arrangements can be made for indemnifying him against any liability for them: section 8 (3) (*b*) of the Settled Land Act, 1925, and section 36 (9) and (10) of the Administration of Estates Act, 1925. It is not suggested that there was ever any likelihood of the specifically devised property being required for the purpose of paying debts, but it is said that there are two circumstances which have hitherto made it impossible for Ian Spencer Horne to insist on having a vesting assent made in his favour. The first is, that until I answered question 3 of this summons, the executor did not know what property was included in the specific devise. The second is that there is pending an application under the Inheritance (Family Provision) Act, 1938, by the widow of the testator who takes no benefit under his will, and that it is possible that the court may make some provision for her out of the rents of the specifically devised property—indeed, theoretically at least, a provision for her which would absorb the whole of the rents.

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[1] [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700; 21 T.C. 449, C.A.

[2] (1893) 68 L.T. 665.

The first point does not appear to me to be of any substance. The fact that there was some doubt as to the extent of the devise would not, I should have thought, have disentitled Ian Spencer Horne from having an assent made in his favour in respect of the property which was undoubtedly comprised in it. The second point, however, is of more weight. Under section 3 (1) of the Inheritance (Family Provision) Act, 1938 (as amended by the Intestates' Estates Act, 1952), where an order is made under the Act the will is to be deemed to have had effect as from the deceased's death subject to such variations as may be specified in the Act, and in *In re Simson*[3] Vaisey J. stated that when an application under this Act was pending executors ought to be cautious in parting with assets to the beneficiaries since the court might subsequently wish to have resort to such assets for the purpose of making provision for the applicant. I think that Vaisey J. was probably thinking rather of the payment of legacies of capital sums than of the execution of a vesting assent in respect of settled real estate. But Mr. Lazarus was disposed to agree in all the circumstances that Ian Spencer Horne has not yet become entitled to require a vesting assent to be executed in his favour, and I am prepared to assume that this is so.

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[3] [1950] Ch. 38, 42; 65 T.L.R. 721; [1949] 2 All E.R. 826.

The question then narrows itself to this: does a life tenant of realty specifically devised by a modern will only become entitled to the actual receipt of the yearly rents and profits within the meaning of such a clause as this when he becomes entitled to require the executor to execute a vesting assent in his favour, or does he become entitled on the death as he would have become entitled under the old law? In my judgment, the modern property legislation has not altered the position as radically as Mr. Knox has contended. On the death of the testator the position of Ian Spencer Horne with regard to the rents of the specifically devised property was totally different from that of Ralph Christopher Inigo-Jones with regard to the income of residue. Ian Spencer Horne became equitably entitled to the rents as they accrued and were received by the executor. It is true that his title to them was not indefeasible. They might be needed to pay debts or to satisfy some provision to be made under the Inheritance (Family Provision) Act, 1938, if any application under that Act were made, but subject to these possibilities of defeasance he had a vested interest to the rents as from the death; his title to them was not contingent. Mr. Knox relied strongly, of course, on the words " actual receipt " in the name and arms clause in support of the view that nothing short of a present right to insist on the rents being paid to him will start the period running. It hardly lies in the mouth of Ian Spencer Horne to say that he was not entitled to require payment of the rents to himself since by letter of February 3, 1958, addressed to the executor's solicitors, his solicitors demanded payment of the rents collected by the executor which they said were due to their client, and in response to that demand the executor paid over £800 on account of such rents. However, in any case, I think that Mr. Knox lays too much stress on the adjective " actual." Apparently this word only came to be added by conveyancers to the words " possession " or " receipt " of the rents and profits " in order to preclude the suggestion that a title in reversion might be included as well as a title in possession: see *In re Petre's Settlement Trusts.*[4] If the words here had been not " who is under the trusts of this my will " entitled to the actual receipt of the rents " but " who is in " actual receipt of the rents " the position might possibly have been different: *In re Duncombe.*[5] But in the phrase with which I have to deal, I do not think that the word "actual" does more than show that only life tenants who under the trusts of the will have a title in possession to the rents are affected by this clause. It appears from *In re Varley*[6] that the existence of a mortgage, the interest on which absorbs all the rents, would not preclude the life tenant in possession from being entitled to "actual possession "and receipt of the rents" within the meaning of this clause. If, therefore, I awarded the widow an annual sum which absorbed all these rents, that would not prevent Ian Spencer Horne from being "entitled to the actual receipt of the yearly rents" within the meaning of this clause. It would be very curious if the fact that the executors are not obliged to make an assent pending the hearing of the application can alter the position if the making of an order in the widow's favour would not itself do so.

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[4] [1910] 1 Ch. 290, 296.

[On March 23, 1960, his Lordship dismissed the widow's application under the Inheritance (Family Provision) Act, 1938, on the ground that the testator had made reasonable provision for the widow.]

Orders accordingly.
Costs and expenses of the trustee and costs of all the other parties on a common fund basis out of the residuary estate.

Solicitors: *Church, Adams, Tatham & Co. for Carpenter & Carpenter, Bath; Mawby, Barrie & Letts for Bell, Pope & Bridgwater, Southampton; Arthur Taylor & Co. for Titley, Long & Co., Bath; Collyer-Bristow & Co. for Wood & Awdry, Chippenham.*

M. G. T.

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[5] [1932] 1 Ch. 622, C.A.

[6] 68 L.T. 665.

TRUSTEES OF TOLLEMACHE SETTLED ESTATES *v.* COUGHTRIE (INSPECTOR OF TAXES).

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Feb. 26, 29; *Mar.* 1, 24.
Lord Evershed M.R., Pearce and Harman L.JJ.

Revenue — Income tax — Excess rents — Land — Royalties of sand-pit — Whether actual or notional receipts taken in making assessment— Whether royalties part of rent—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 82, *Sch. A, paras.* 1, 2, 175 (1) (*a*).

Revenue—Income tax—Appeal to High Court—Form of order—Remission of case to commissioners—Self-contained order.

Practice—Title of proceedings—Plaintiff—"Trustees of estate"—Whether appropriate—Revenue appeal (post, p. 490).

By a lease dated December 17, 1946, a sand-pit was let for a term of 21 years from March 25, 1946, at an annual surface rent of £10 and a royalty of 6d. per ton for all sand worked. In the year 1946–47 the royalties payable under the lease were just under £100, but they mounted steadily and in 1955–56 were £850, an average of about £390 a year. At first the sand-pit was not separately assessed to Schedule A, but for the year 1953–54, following the decision in *Russell* v. *Scott* [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375, it was assessed to Schedule A tax in the sum of £3 5s. and assessments of £5 and £1,000 in respect of excess rents and royalties respectively were made under Schedule D. On appeal the General Commissioners held that the royalties were within section 175 of the Income Tax Act, 1952,[1] and should be treated as

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[1] Income Tax Act, 1952, s. 82: "The Schedule referred to in this Act "as Schedule A is as follows— "Schedule A: 1. Tax under this "Schedule shall be charged in respect "of the property in all lands, tene-"ments, hereditaments and heritages "in the United Kingdom . . . for "every twenty shillings of the annual "value thereof: Provided that tax "in respect of certain lands, tene-"ments, hereditaments or heritages "in the United Kingdom, that is "to say, in the case of the follow-"ing concerns, namely—(*a*) quarries "of stone, slate, limestone or chalk; "and (*b*) mines of coal, tin, lead, "copper, mundic, iron and other "mines; and (*c*) ironworks, gasworks, "salt springs or works, alum mines "or works . . . and other concerns of "the like nature having profits from "or arising out of any lands, tene-"ments, hereditaments or heritages, "shall not be charged under this "Schedule, but the profits . . . shall "be charged to tax under Case I of "Schedule D . . . 2. The annual "value for the purposes of this "Schedule shall, in the case of all "lands, tenements, hereditaments or "heritages, of whatever nature and "for whatever purpose occupied or "enjoyed, and of whatever value, be "understood to be—(*a*) if they are let "at a rack rent and the amount of "that rent has been fixed by agree-"ment commencing within the period "of seven years preceding the fifth "day of April next before the time of "making the assessment, the amount "of the rent by the year at which "they are let; or (*b*) if they are not "let at a rack rent so fixed, then the "rack rent at which they are worth to "be let by the year. . . ."

S. 175: "(1) If, as respects any "year of assessment, the immediate "lessor of a unit of assessment is "entitled in respect of the unit to "any rent payable under a lease or "leases to which this section applies, "he shall be chargeable to tax under "Case VI of Schedule D in respect "of the excess, if any, of the amount "which would have been the amount "of the assessment of the unit for the "purposes of Schedule A, as reduced "for the purpose of collection, if the "annual value of the unit had been "determined (in accordance, in what-"ever part of the United Kingdom "the unit is situated, with the pro-"visions of Part III of this Act) by "reference to that rent and the other "terms of the lease or leases, over "whichever is the greater of—(*a*) the "actual amount of the assessment of "the unit for the purposes of Schedule "A, as reduced for the purpose of "collection; or (*b*) the amount of "any rent payable by the immediate excess rents under Schedule D, and they altered the assessment to £35 in respect of the dead rent and £646 in respect of the actual royalties received in that year, less the Schedule A assessment, the net aggregate figure being £681. The taxpayers appealed.

Upjohn J. reversed the decision of the commissioners, holding that the assessment should be on Schedule A principles, and ordered that the case should be remitted to the commissioners to adjust the assessment in accordance with his judgment.

On appeal it was admitted that the royalties were covered by section 175 of the Income Tax Act, 1952, and fell to be taxed as excess rents under Case VI of Schedule D. The Crown contended, contrary to what Upjohn J. held, that the assessment should be made year by year on the basis of the actual receipts, subject to certain deductions, and not by way of assessment as on Schedule A principles with evidence as to values:—

Held, allowing the Crown's appeal, that the assessment under section 175 of the Income Tax Act, 1952, was a yearly one, and the excess rents should be assessed by reference to the actual rent plus royalties received without any valuation on Schedule A principles, except for the purpose of deductions and allowances.

Strick v. *Longsdon* (1953) 34 T.C. 528 and *Barron* v. *Littman* [1953] A.C. 96; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373, H.L. considered.

Per Lord Evershed M.R. I should like to register my disapproval of the form of order whereby this case is remitted to the commissioners to adjust the assessment in accordance with the judgment. The order must be self-contained (post, p. 490).

Decision of Upjohn J. [1959] 1 W.L.R. 900; [1959] 2 All E.R. 582 reversed.

APPEAL from Upjohn J.[2]

On October 8, 1957, the trustees of the Tollemache Settled Estates, the taxpayers, appealed to the General Commissioners against an assessment to income tax made upon them under Schedule D of the Income Tax Act, 1952, for the year 1953–54 in the sum of £5 in respect of excess rents and of £1,000 in respect of royalties.

The case stated that the following were among the facts admitted or proved before the commissioners: By a lease dated

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"lessor in respect of the unit under "any short lease or short leases. . . . "(4) A lease shall be deemed to be a "lease to which this section applies "if, and only if, the following condi-"tions are fulfilled with respect to "it—(*a*) that it is a short lease; "and (*b*) that the land comprised in "it is or forms part of a single unit "of assessment; and (*c*) that the rent "under it is payable to the immedi-"ate lessor of that unit; and (*d*) that "the estate or interest of the imme-"diate lessor of that unit is not, as "respects any part of that unit, sub-"ject to any short lease which com-"prises also land not wholly within "that unit, being a lease the rent "under which is payable to that "immediate lessor."

[2] [1959] 1 W.L.R. 900; [1959] 2 All E.R. 582.

December 17, 1946, made between the then trustees of the Tollemache Settled Estates and three persons trading together in partnership as the Tarvin Supply Co., as the tenants, the trustees demised to the tenants for a term of 21 years from March 25, 1946, a sand-pit at Beeston, Cheshire, on the Peckforton estate forming part of the Tollemache Settled Estates.

So far as material, clause 2 of the lease provided as follows: "In consideration of the rents and royalties hereinafter "reserved and of the covenants, conditions and agreements "hereinafter contained and by the tenants to be paid observed "and performed the lessors hereby demise unto the tenants the "following liberties:—(*a*) liberty for the tenants to enter upon "and occupy the said land; (*b*) liberty for the tenants and their "servants and workmen . . . to dig raise and get by open "surface workings in and from the said land the demised sand."

Clause 6 of the lease provided that the tenants should pay a surface rent of £10 per annum and a royalty of 6d. per ton for all sand worked and gotten from the demised land and that the said rent and royalties should be due and payable quarterly.

The area originally demised to the tenants was an area of approximately 2 acres and 9 perches. Clause 10 of the lease provided that, when the tenants should have removed from the demised land all the demised sand, they should be entitled to occupy and work and to remove sand from certain additional land adjoining the land originally demised; and that, as from the date of such occupation, the tenants should pay, in addition to the surface rent and royalty referred to in clause 6, a yearly surface rent at the rate of £5 per acre in respect of all additional land from time to time occupied. In accordance with the provisions of clause 10, the tenants occupied an additional 5 acres from September 29, 1953.

In previous years the Beeston sand-pit was not separately assessed to Schedule A, but for the year 1953–54 an assessment under Schedule A in respect of the sand-pit was made upon the tenants as follows:

Gross annual value	£3	15	0
Repairs allowance		10	0
Net annual value	£3	5	0

This assessment was made by reference to the original area of the sand-pit, the additional 5 acres taken over by the tenants in September, 1953, being covered by the separate assessment of a farm of which the land originally formed part.

At the commencement of the term for the year 1946–47 the royalties payable were just under £100, and thereafter mounted steadily until in 1955–56 they were £850, an average of about £390 per annum.

Evidence was given on behalf of the taxpayers, by a chartered surveyor and chartered land agent, to the effect that, in his opinion, a reasonable fixed rent for the original area of the sand-pit, together with the additional 5 acres taken over in September, 1953, for a 21 year lease from March 25, 1946, would have been £292 per annum; this calculation was based on what a tenant taking a 21 year lease in 1946 might have been prepared to pay by way of rent on an estimated tonnage of sand available in the area of 446,444 tons. The Crown's valuer estimated such rent at £500 per annum. That calculation was based on an estimated tonnage of sand available in the area of 462,825 tons. Both witnesses were of the opinion that a sand-pit would rarely be let at a fixed rack rent for a term of 21 years. The only terms of letting satisfactory to both landlord and tenant were those adopted in the present case, whereby the tenant paid a small fixed rent and a royalty per ton of sand extracted.

The commissioners did not find it necessary to decide the question what rent a tenant might have been prepared to pay for the area covered by the assessment under appeal if offered a lease for 21 years in 1946.

As to the alternative approach put forward on behalf of the Crown, the witnesses said that if asked to estimate, at the beginning of a year, a fair annual value for occupation of the sand-pit over the coming year, they would have to consider all the circumstances, including the results of the previous year's working, and the likely commercial demand for sand in the coming year. In the absence of any significant change of circumstances, their valuation would not differ greatly from that shown by the previous year's working.

On behalf of the taxpayers it was contended: (1) that, in so far as the assessment under appeal purported to be an assessment in respect of royalties, there was no provision of the Income Tax Act, 1952, under which such an assessment could be made; (2) that in so far as the assessment under appeal purported to be an assessment in respect of excess rent under section 175 of the Income Tax Act, 1952, the only rent to which

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the appellants, as immediate lessors, were entitled within the meaning of that section, was the surface rent payable under clause 6 of the lease and any additional surface rent payable under clause 10; (3) that section 175 did not justify an assessment being made after the end of the year of assessment by reference to the royalties actually paid by the tenants in the year of assessment; section 175 could only operate where the immediate lessor was entitled to rent payable under a lease the amount of which could be quantified at the beginning of the year of assessment; (4) that, if section 175 was applicable, the section required a notional Schedule A assessment to be made in accordance with the provisions of paragraph (2) of section 82; any such notional Schedule A assessment should be made on the footing that the rack rent at which the land in question was worth to be let by the year did not exceed £292; and (5) that the appeal should be allowed and the assessments reduced.

On behalf of the Crown it was contended: (1) that the royalties payable under the lease dated December 17, 1946, were "rent" for the purposes of section 175; (2) that an assessment fell to be made under section 175 for the year 1953–54 by reference to the rent, including royalties, paid in that year and the other terms of the lease; (3) alternatively, that if, contrary to the Crown's contentions, the value of the lessors' rights had to be ascertained before the beginning of the year, it should be estimated afresh at the beginning of each year in the light of the facts then known; and (4), in the further alternative, that, if an annual value over the whole term of the lease had to be ascertained, that value in this case should be £500.

The commissioners gave their decision as follows: "1. We "have decided that in this case royalties are covered by section "175 of the Income Tax Act, 1952, and should be taxed as excess "rents under Case VI of Schedule D. 2. The assessment for "tax will be the excess received above the Schedule A assessment, "and this figure is the dead rent received, namely, £35, plus the "actual royalties received during the current tax year, £646, less "the Schedule A assessment." The total annual sum being £681.

The commissioners were subsequently informed that for the year 1953–54 a further assessment had been raised on the sand-pit under Schedule A, which took account of the increased area of occupation from September 29, 1953, and that the parties had agreed a figure of £577 to give effect to the decision, and the commissioners accordingly reduced the assessment to £577

The taxpayers required the commissioners to state a case pursuant to section 64 of the Income Tax Act, 1952, the point of law for the opinion of the High Court being whether, on the facts found, their decision was correct in law.

Upjohn J. held that under section 175 the assessment should be on Schedule A principles but that actual receipts of royalties should not be taken, and a notional computation should be made, either by treating the rent and royalties as a rack rent and averaging them out (applying *Inland Revenue Commissioners* v. *Dickson's Executors* [3]), or by determining the proper rack rent over the term of 21 years under section 82, Schedule A, paragraph 2 (*b*) from a consideration of the terms of the lease, and he made an order in the following terms: "It is ordered that the said case "be remitted to the said commissioners for them to adjust the "assessments in accordance with the judgment of this court."

The Crown appealed.

R. O. Wilberforce Q.C. and *Alan Orr* for the Crown. It is admitted by both parties that section 175 of the Income Tax Act, 1952, has to be applied. The question is whether the excess rents payable in respect of this sand-pit, which are taxable under that section, should be assessed by reference to the actual rent and royalties received under the lease or should be estimated, as Upjohn J. held, by a notional Schedule A assessment to be made in accordance with paragraph 2 (*b*) of section 82. The Crown does not contend that such excess rents should be calculated on the gross rent and royalties received, but on the net rent and royalties after allowing the deductions and allowances which Schedule A prescribes. In the past years there has been a steady increase in the amount of the sand taken from this sand-pit. The amount, however, may diminish in the future. Section 175 is intended to deal with the case where the sum received by the taxpayer exceeds the rent to be assessed under Schedule A. Since the suspension of quinquennial valuations in 1940 the number of cases where there are such excess rents have increased. [Reference was made to *Russell* v. *Scott* [4] and *Fry* v. *Salisbury House Estate Ltd.*[5]]

The deductions which must be allowed from the gross rents are those permitted by sections 99 and 101 (1). After such

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[3] 1928 S.C. 752; 14 T.C. 69.

[4] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375, H.L.

[5] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266, H.L.

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deductions have been made, there is a difference between an assessment by the Schedule A process and the section 175 process. There is nothing in the decision in *Barron* v. *Littman*[6] or in the observations of Lord Asquith in that case to prevent the actual rent paid being the rent for the purposes of section 175. It is not contended that in section 175 "entitled . . . to any "rent payable under a lease" means the rent actually received, but the rent after deductions. The tax in section 175 is a tax on profits. If there are no profits, there is no tax. Normally, excess rents are directly calculated without any assessment being made on Schedule A principles: *Strick* (*Inspector of Taxes*) v. *Longsdon.*[7] The decision in *Inland Revenue Commissioners* v. *Dickson's Executors*,[8] referred to by Upjohn J., was a different case, since it was a case of variable rents. The Crown does not wish to accept any Schedule A system of valuation.

Alan Orr following. The Crown's case depends on the meaning of "that rent" in section 175. "That" refers to the rent which a lessor receives which exceeds the Schedule A assessment. That in this case is £646. The computation of the excess rent must be made each year.

H. H. Monroe for the taxpayer. Under the Income Tax Act, 1952, there is a Schedule A code and a Schedule D code. The difference between the two codes is that under the A code the annual value is the measure of liability; under the D code the measure is the income arising or the profits and gains. The annual value is different from the profits and gains. The question here is which code applies in construing section 175. The essence of annual value is that one year is taken with another. Section 175 is not intended to provide for fluctuating rents. The day-to-day royalties figures must be converted into a rack rent for the premises, which must be estimated on Schedule A principles in accordance with section 82 (2) (*b*). The draftsman of section 175 was concerned with a normal rent, not with royalties. The words in brackets in section 175 refer back to Part III of the Act, and turning to Part III the assessment is based under section 82 on annual value. The fact that the charge for excess rent is made under Case VI of Schedule D does not mean that the measure of liability is not to be assessed on Schedule A principles. [Reference was made to the observations of Lord Asquith in *Barron* v. *Littman*[9] and to *Strick* (*Inspector of Taxes*) v. *Longsdon*.[10]]

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[6] [1953] A.C. 96, 122; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373, H.L.

[7] (1953) 34 T.C. 528.

[8] 1928 S.C. 752; 14 T.C. 69.

It is submitted: (1) that on the true construction of section 175 excess rent must be calculated on the Schedule A basis in accordance with Part III of the Act; (2) that such assessment must be made each year; (3) that the annual value is to be a computed figure based on rent and the terms of the lease, which can in principle be agreed each year in advance; (4) that whatever is charged under Case VI is the difference between the two assessments under Schedule A. [Reference was made to *A. P. Gundry* v. *D. Dunham* (*Surveyor of Taxes*)[11]; *Davies* v. *Abbott*[12]; *Reg.* v. *Westbrook*[13]; *Inland Revenue Commissioners* v. *Dickson's Executors*.[14]]

R. O. Wilberforce Q.C. in reply. The point is a narrow one. It turns on the meaning of the direction in section 175 that the excess rents shall be determined by reference to the rent and the other terms of the lease. These words provide an ad hoc formula for the purpose of section 175 and prevent the application of the formula in section 82 (2) (*b*). The reference to Part III in section 175 does not mean that for the purpose of that section annual value must be calculated in the way laid down in section 82 (2) (*b*). There has been no decision on the calculation of excess rents where royalties have been paid.

Cur. adv. vult.

March 24. The following judgments were read.

LORD EVERSHED M.R. I have asked Pearce L.J. to deliver the first judgment.

PEARCE L.J. This case concerns the assessment of certain royalties received by the taxpayers in respect of sand-pits let by them. These royalties are admittedly covered by section 175 of the Income Tax Act, 1952, and fall to be taxed as excess rent under Case VI of Schedule D. The Crown contend that the assessment should be made year by year on the basis of the actual receipts, subject to certain deductions. The General Commissioners adopted that view. On an appeal by the taxpayers, who contended that there must be an assessment on Schedule A principles with evidence as to value, the judge accepted their contention and remitted the case to the commissioners.

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[9] [1953] A.C. 96, 122.

[10] 34 T.C. 528.

[11] (1915) 32 T.L.R. 142; 7 T.C. 12, C.A.

[12] (1927) 11 T.C. 575, C.A.

[13] (1847) 10 Q.B. 178.

[14] 1928 S.C. 752; 14 T.C. 69.

The material part of section 175 reads as follows: "(1) If, as "respects any year of assessment, the immediate lessor of a unit "of assessment is entitled in respect of the unit to any rent "payable under a lease or leases to which this section applies, "he shall be chargeable to tax under Case VI of Schedule D "in respect of the excess, if any, of the amount which would "have been the amount of the assessment of the unit for the "purposes of Schedule A, as reduced for the purposes of "collection, if the annual value of the unit had been deter-"mined (in accordance, in whatever part of the United Kingdom "the unit is situated, with the provisions of Part III of this Act) "by reference to that rent and the other terms of the lease or "leases, over whichever is the greater of—(*a*) the actual amount "of the assessment of the unit for the purposes of Schedule A, as "reduced for the purpose of collection; or (*b*) the amount of any "rent payable by the immediate lessor in respect of the unit "under any short lease or short leases."

The problem here is to find what is the amount which would have been the amount of the assessment for the purposes of Schedule A if the annual value had been determined "by refer-"ence to that rent and the other terms of the lease." "That "rent" is the rent to which the lessor is entitled in the year in question, the rent whose excess over the Schedule A assessment has provoked the incidence of section 175—namely, in this case, £681. The opening words, "if, as respects any year of assess-"ment," indicate that the section envisages a yearly operation. The fact that the charge is under Case VI of Schedule D makes it clear that the assessment is aimed at a year's profit or gain.

According to the taxpayers, the section really does no more than provide for a revaluation of Schedule A assessments, and the resulting excess liability is only put into Case VI, Schedule D, because that is a receptacle for oddments. It is said further that the resulting assessment would involve an inquiry on Schedule A principles; namely, what the unit is worth to be let by the year, having regard not only to the rent of £681 received this year, but also "to the other terms of the lease," including the fact that there are several years of the lease to run. It is not disputed that this procedure will produce a different and practically always a lower figure than that produced by an assessment on the actual figure of the excess rent. In spite of Mr. Monroe's forceful argument, I cannot accept this view of the section.

The Schedule A assessment under section 82 is an attempt to find the annual value. If a rack rent has been fixed within the preceding seven years, then that is the annual value: if such a useful guide cannot be found, and the premises are not let at a rack rent so fixed, the inquiry is to ascertain the rack rent which the premises are worth to be let by the year. From a practical point of view, section 175 comes into play because, during the year in question, there is an extra profit to be taxed, and the rent to which the lessor has become entitled has shown the inadequacy of the Schedule A assessment; it has shown that either the actual rack rent or the estimate of the rack rent at which the premises are worth to be let by the year has produced an annual value that is incorrect for the year in question. The section directs that the lessor shall be chargeable on the amount which would have been the Schedule A assessment if the annual value of the unit had been determined by reference to "that "rent"—namely, a rent of £681; that is, if the actual rack rent or the rack rent at which it is worth to be let had been £681. There is no need for further valuations or for calculations under section 82 (2) (*a*) or (*b*). The words "by reference to that rent" provide an ad hoc formula for the ascertainment of the annual value; a formula which excludes further estimation. The figure of £681 is, as it were, written into section 82, or is a tertium quid to (2) (*a*) and (*b*). The case has to be considered as a Schedule A case only for the purpose of deductions and allowances. When section 175 refers to the annual value being determined by reference to "that rent and the other terms of the lease," the "other terms" mean those which are relevant to allowances, such as liability for rates and maintenance.

The Master of the Rolls in argument pointed out that, if the excess rent is lower than the rent at which they are worth to be let (as it well might be), the computation could not be made under section 82 (2) (*b*), as Mr. Monroe contends should be done in each case. For the computation has to be done by reference to "that rent"—that is, the actual rent for the year—while section 82 (2) (*b*) demands the computation of the rack rent at which they are worth to be let. In such a case, a tertium quid is necessary in section 82 (2), and that tertium quid must surely be the actual rack rent for the year in question, which is the objective of section 175. It would be thus more analogous to subsection (2) (*a*), which uses a recent actual rack rent where it can be found.

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Pearce L.J.

It would be contrary to good sense that the section, whose object was to ensure that certain actual profits did not go untaxed, should throw the assessment away from the realm of actual and exact figures, and back into the realm of estimation, in which the profit had once already been allowed to escape. Seeing that the assessment under section 175 is a yearly one, intended to catch a particular year's profit, it is hard to believe that it intended to send each case back to section 82 for a valuation focused not on the particular year but on a period of years, and calculated to assess "what a tenant taking one year with another "may fairly and reasonably be expected and required to pay" (*per* Swinfen Eady L.J. in *A. P. Gundry* v. *D. Dunham* (*Surveyor of Taxes*)[1]). Had such an odd result been intended it would have been very easy to say so.

The normal case of excess rents is dealt with by direct calculation without a further assessment on Schedule A principles. For instance, in the case of *Strick* (*Inspector of Taxes*) v. *Longsdon*[2] the direct figures of the excess rents were used without embarking on further computation (except as to deductions). I see no reason why this case should differ from it. This view accords with that expressed by Lord Reid in a somewhat different context in *Barron* v. *Littman*,[3] where he said: "The calculation which section 15," now section 175, "directs is simply the method by which profits "from the transaction are to be measured for income tax purposes "and the assessment and charge to tax under the section are in "respect of the profits so measured."

The point is not an easy one, but for these reasons I would allow the appeal.

HARMAN L.J. I agree. Section 175 is designed to deal with the injustice caused by the delay in reassessing freeholds under Schedule A. These assessments were intended to represent rack rents, but first they were allowed as a matter of convenience to run for a quinquennium, and then, owing to the war, even these reassessments were pretermitted. Meanwhile, in a period of inflation, values were continually going up, and landowners were more and more escaping from making a fair contribution to taxation. Hence section 175, the object of which was to tax "excess "rents": excess over what?—over the out-of-date Schedule A values. It follows that one expects to find in the section provisions designed to tax the difference between the existing Schedule A assessment and the rent actually being received. And this is what you do find, the words "that rent," meaning the actual rent receivable by the landlord in the year of assessment. The words are, slightly rearranging them: He shall be chargeable to tax under Case VI of Schedule D in respect of the excess over the actual Schedule A assessment of the amount which would have been the Schedule A assessment, if the annual value of the unit had been determined by reference to that rent and the other terms of the lease. Note that this is a Schedule D assessment, and, therefore, not concerned with any but the one year in respect of which it is made. The reference to the "other "terms of the lease," in my judgment, points to such things as covenants to repair, to pay rates, and so forth, not to the "term" of the lease.

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[1] (1915) 32 T.L.R. 142; 7 T.C. 12, 22, C.A.

[2] (1953) 34 T.C. 528.

[3] [1953] A.C. 96, 119; [1952] 2 T.L.R. 445; [1952] 2 All E.R. 548; 33 T.C. 373, H.L.

If this were all, there would be an injustice to the landlord, who would be unable to deduct from the actually receivable rent those allowances which Schedule A provides. Hence the reference to the hypothetical Schedule A assessment. This does not entail a new valuation: that is precluded by laying down "that "rent" as the gross figure. The net figure is to be arrived at on Schedule A principles—that is, with the deductions and allowances which that Schedule prescribes—and will thus be truly comparable with the actual Schedule A figure which has undergone the same process. To postulate a new valuation—which ought, I should have thought, if properly done, to make no difference—is, to my mind, to reject the words "that rent," and is unjustified. If Mr. Monroe were right, the section should simply have provided that wherever the receivable rent is in excess of the actual Schedule A assessment, there shall be a new Schedule A assessment, and that it did not do.

LORD EVERSHED M.R. It has been agreed on both sides that the case before the court falls within, and is governed by, section 175 of the Income Tax Act, 1952. The question, therefore, is one of the interpretation, as applied to the facts of the case, of section 175.

The taxpayers here are "entitled . . . to . . . rent payable "under a lease . . . to which this section applies." They are, therefore, chargeable to tax under Case VI of Schedule D in respect of "the excess . . . of the amount which would have been "the amount of the assessment of the unit for the purposes of "Schedule A, as reduced for the purposes of collection, if the "annual value of the unit had been determined (in accord- "ance . . . with the provisions of Part III of this Act) by reference "to that rent and the other" (relevant) "terms of the lease . . . "over," in this case, "the actual amount of the assessment of "the unit for the purposes of Schedule A" (viz., £10 15s.) "as "reduced for the purpose of collection." I have set out the material language, with the insertion of the word "relevant" before the phrase "terms of the lease" and of the figure of the actual amount of the Schedule A assessment; and I have emphasised what appear to me to be the most important words.

It was conceded clearly (as I understood) by Mr. Monroe that the necessary calculation or reassessment has to be made every year—not, that is to say, notionally in 1946 or at the beginning or end of the tax year in question (1953–54), and so as to persist for the whole period of the lease, or for the period for which the actual assessment of £10 15s. lasts, or for any other indefinite period. It also seems to me clear that what I will call the Schedule A reassessment (which the section postulates as the "top figure" for the purposes of arriving at the subject-matter to be taxed) is to be based on the actual rent and other relevant terms of the lease—which I take to mean, in this case, the royalty provisions. You are therefore, in my view, not required in accordance with section 82 of the Act to look for or discover a rack rent properly so called. For the purpose of the calculation which section 175 requires, the rent plus royalty (in the present case) actually paid or assumed or contemplated as payable takes the place of the rack rent. If the present lease provided for a rent (in the ordinary way) greater than the actual Schedule A assessment but less than the true rack rent, the lease rent would clearly, in my view, form the basis of the Schedule A reassessment and not the true rack rent. The result, in my view, is that, in spite of the reference in section 175 to Part III of the Act, the case is outside the strict language of section 82, paragraph (2). In other words, it is neither a (2) (*a*) nor a (2) (*b*) case—and in this respect, like my brethren, I have ventured to differ from Upjohn J., as he then was.

So far, as it seems to me, and as a result of the discussion before us, there is no real dispute between the parties. The sole issue appears to be this: the Crown say: "You arrive each year "at the top figure by reference solely to the actual rent and "royalty figures for that year"; the taxpayers say, "No; you "arrive each year at a valuer's figure of annual value at the date "of the valuation, based on the known facts as to rent and royalty "but not arithmetically limited to the figures of rent and "royalty for the year in question."

Common sense at any rate seems to point to the two figures being the same. But there appears to be no doubt from the fact that the case has come before us, and from what Mr. Monroe has said, (and I therefore assume) that the taxpayers' figure will in practice be found to be somewhat less than that based on the Crown's view. Which, then, is right? It is upon this matter that I confess to having felt greater difficulty than my brethren, and to have doubted whether we should not prefer, as I understand the judge did, the taxpayers' method of assessment.

The reasons for my doubt are as follows: true, the relevant premises for the reassessment are the rent and royalty figures and not a rack rent, so that the case is neither a (2) (*a*) nor a (2) (*b*) case; still, apart from the substitution of these rent and royalty figures for the rack rent, you are directed by section 175 to make your assessment in accordance with Part III of the Act. What is more, you are directed by section 175 to arrive at your reassessment by determining the annual value of the unit: and this conception of "annual value" is, according to section 82, inherent in all Schedule A assessments. If the rent under the present lease were a flat rent of £681 per annum, there being no royalties, there would, of course, be nothing in it; but if the rent were a flat rent but increasing, say, every three or five years, then I am not satisfied that you would not in any year work on the basis of an average for the term rather than upon the actual rent payable in any particular year (see the case of *Inland Revenue Commissioners* v. *Dickson's Executors*[4]). If this is right, then it may be said that a similar principle of valuation should apply in the present case. I have also felt the force of the argument that the contrary view involves the result that you are construing section 175 as though it had said that the "top figure" in any year was the actual sum received in that year for rent, including royalty, subject to the deduction appropriate to a Schedule A assessment: and the section does not in terms so provide. You find instead the express reference to "annual

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[4] 1928 S.C. 752; 14 T.C. 69.

"value," which is of the essence of the Schedule A code. If this view were right, then the question that, in respect of the year 1952–53, the assessors would have to answer is: "What is the annual value, this year, of this unit (according to Schedule A principles) on the basis that the rent it commands is the fixed rent and royalties payable now and henceforth according to the subsisting lease? In other words, the "top figure" would be arrived at by the taxpayers' method of assessment.

This difficult and somewhat artificial case has required section 175 of the Act to be applied to circumstances to which I cannot think it was ever intended to be applicable. I have therefore, and in deference to the view taken by the judge, thought it right to express my doubt, and my reason for it. But I have in the end thought that the claims of simplicity and common sense should prevail, and I am not therefore prepared to dissent from the clear conclusion to which my brethren have arrived. I agree with them that the appeal should be allowed.

Lord Evershed M.R. I should like to register my own disapproval of the form of order made below. "It is ordered that "the case be remitted for them [the commissioners] to adjust "the assessments in accordance with the judgment of the court." It is not right. The order must be self-contained. These things are so much a mystery that it may be that counsel say it is difficult to understand what the order should be, but you must try.

Alan Orr. I appreciate what your Lordships are saying. I can only say that this form of order, so far as I can discover, has been used for a long time. I do not know of any case in which it has produced any difficulty.

Lord Evershed M.R. It is not right; and what you have just said, I confess, sounds very likely to be true: just because this has gone on in Revenue cases for the last century and a half, so it goes on. It is time it was stopped. We also ask you to consider—this is another matter—that to entitle an action "The trustees of the (blank) Settled Estates," if they are not a corporation sole, or something of the sort, again is wrong.

Alan Orr. I find it impossible to say anything about that, my Lord.

LORD EVERSHED M.R. Would you please see that these things are not repeated out of sheer adherence to tradition?

Appeal allowed with costs.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Peake & Co.*

B. A. B.

In re CAUNTER'S CHARGE.
BISHOP *v.* SOUTHGATE CORPORATION.

[1959 C. No. 837.]

1959
Oct. 20.

Danckwerts J.

Mortgage — Small dwellings — Local authority first charge — Sale of premises by local authority—Whether local authority accountable out of surplus to second chargee—Small Dwellings Acquisition Act, 1899 (62 *&* 63 *Vict. c.* 44), *s.* 6 (2).

By section 6 of the Small Dwellings Acquisition Act, 1899: "(1) Where a local authority order the sale of a house without "taking possession, they shall cause it to be put up for sale by "auction, and out of the proceeds of sale retain any sum due to "them . . . and pay over the balance (if any) to the proprietor. "(2) If the local authority are unable at the auction to sell the "house for such a sum as will allow of the payment out of the "proceeds of sale of the interest and principal of the advance then "due to the authority . . . they may take possession of the house ". . . but shall not be liable to pay any sum to the proprietor."

In November, 1953, the plaintiff agreed to sell her freehold house to C., who obtained a loan of £1,800 from a local authority on the security of a first charge on the premises under the Small Dwellings Acquisition Acts, 1899 to 1923. The plaintiff lent C. the remaining £450 of the purchase-money on the security of a second charge on the premises. Completion took place on March 15, 1954, and on that date the two charges were executed. C. fell into arrears with the instalments payable to the local authority, who, on February 14, 1958, put the premises up for sale by auction under section 6 (1) of the Act of 1899, but the reserve price of £1,850 was not reached. On July 25, 1958, the local authority obtained an order for possession of the house and proceeded to sell it with vacant possession for £2,200. The total amount then due to them in

[Reported by Miss PHILLIPA PRICE, Barrister-at-Law.]

respect of principal, interest, costs and expenses amounted to £1,905 3s. 5d. The local authority asserted that by reason of section 6 (2) they were not liable to account to the plaintiff out of the surplus for what remained due to her under the second charge, but that they were bound to retain such surplus as a profit for their ratepayers. On a summons to determine whether the local authority were accountable to the plaintiff for the moneys due to her under the second charge:—

Held, that section 6 (2) of the Act did not deprive a chargee, who could be a different person from the "proprietor," of his rights to repayment by reason of the default of the proprietor, and that those rights remained unless they were disposed of by a foreclosure action. The local authority were, therefore, accountable to the plaintiff for any balance of the proceeds of sale remaining in their hands after the satisfaction of their own claims.

In re Brown's Mortgage [1945] Ch. 166; [1945] 1 All E.R. 397 considered.

ADJOURNED SUMMONS.

In November, 1953, the plaintiff, Beatrice May Bishop, the registered proprietor with an absolute title of a house known as 55, Eaton Park Road, Palmers Green, Middlesex, arranged to sell the premises to a purchaser, Charles Richard Caunter, for £2,250. Since he could not find the purchase-money, it was arranged that he should borrow the first £1,800 thereof from the defendants, the Southgate Corporation, on the security of a first charge on the premises under the Small Dwellings Acquisition Acts, 1899–1923, and that the plaintiff would lend him the remaining £450 of the purchase-money on the security of a second charge on the said premises. The sale of the premises was duly completed in accordance with these arrangements on March 15, 1954. On that date there was executed a transfer of the premises by the plaintiff to the purchaser, a first charge on the premises made by the purchaser in favour of the defendants, to secure the principal sum of £1,800 and interest thereon, and a second charge on the premises made by the purchaser in favour of the plaintiff to secure the principal sum of £450 and interest thereon. On March 27, 1954, these documents were registered at H.M. Land Registry. As the advance secured by the defendants' first charge was made under the Small Dwellings Acquisition Acts, there was entered in the register of the title a restriction restraining disposition by way of transfer by the proprietor of the premises or in exercise of the power of sale in any subsequent charge without the consent of the proprietor of the defendants' first charge. At all material times, therefore, the defendants had notice of the plaintiff's second charge.

After the completion of the purchase the plaintiff remained in the house as the purchaser's tenant in part of the premises. At a later date the purchaser defaulted under his first charge to the defendants, sublet the rest of the premises and disappeared. On February 14, 1958, the defendants offered the premises for sale by auction, but at the auction sale the reserve price of £1,850 was not reached. The defendants then commenced proceedings for possession against the plaintiff and the other tenants, and on July 25, 1958, an order for possession was made by the Registrar of Edmonton County Court. Having obtained vacant possession, the defendants sold the premises for £2,200, a sum which was more than sufficient to pay off the £1,905 3s. 5d. that was then due to them in respect of principal, interest, costs and expenses under the first charge, and left a surplus in their hands. The defendants, however, refused to account to the plaintiff out of that surplus for what remained due to her under the second charge, and asserted that they were entitled and bound to disregard it and retain the surplus as a profit for their ratepayers.

The plaintiff took out an originating summons, asking the court to determine whether, upon the true construction of the Small Dwellings Acquisition Acts, 1899–1923, and in the events that had happened, the defendants were or were not liable out of the surplus of the proceeds of sale of the premises, remaining after satisfaction of the principal moneys, interest, costs and expenses due to the defendants under the first charge, to account to the plaintiff for the moneys due to her under the second charge.

G. B. H. Dillon for the plaintiff. Section 6 (2) of the Small Dwellings Acquisition Act, 1899, expropriates the interest of "the proprietor." Section 4 (2) refers to charges or second mortgages being made by "the proprietor" and clearly does not contemplate that a second mortgagee will thereupon himself be "the proprietor." The expression "the proprietor" is used on many occasions in the Act in contexts where it cannot conceivably include a second mortgagee, for example, in sections 2 (*a*), 3 (1) (*b*), (4) and (5), 4 (1) and 7 (2) and (3).

The definition of "the proprietor" in section 10 (3) fitted Caunter, but did not fit the second mortgagee, and it would be a monstrous injustice for the interest of the second mortgagee, who was not in default, to be expropriated under section 6.

Donald C. Potter for the defendant corporation. This case is entirely covered by *In re Brown's Mortgage*,[1] and on that decision the corporation cannot pay the plaintiff anything out of the surplus moneys. On general principles of equity a second mortgagee claims under the mortgagor and cannot have a better title than the mortgagor has.

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[1] [1945] Ch. 166; [1945] 1 All E.R. 397.

DANCKWERTS J. This summons involves the construction of the Small Dwellings Acquisition Act, 1899, which, as its title shows, was passed to empower local authorities to advance money to any person to enable him to acquire a small house in which he intended to reside. In other words, it was an Act which enabled a proprietor to acquire a house on easy terms compared with those which he might have to pay if he had to go into the open market for a loan.

[His Lordship stated the facts and continued:] The Small Dwellings Acquisition Act, 1899, has been amended by certain statutes but those amendments do not affect the present point, their only material effect being to raise the total of the market value of a house on which a local authority might loan money from £1,300 to £5,000.

Section 1 provides: "(1) A local authority for any area may, "subject to the provisions of this Act, advance money to a "resident in any house within the area for the purpose of "enabling him to acquire the ownership of that house; . . ." Then there are certain provisos as to the market value of the house providing that an advance shall not be made for the acquisition of the ownership of a house where, in the opinion of the local authority, the market value exceeds a figure which is now £5,000, and, further, that the advance shall be repaid with interest over a period of thirty years. Then by section 2 it is provided: "Before making an advance under this Act in respect "of a house a local authority shall be satisfied—(*a*) that the "applicant for the advance is resident or intends to reside in "the house, and is not already the proprietor within the meaning "of this Act of a house to which the statutory conditions "apply; . . .": of course, the whole purpose of the Act is to enable people to acquire houses in which they intend to reside. Nothing material today turns on section 3. Section 4 provides: "(1) Where "the ownership of a house has been acquired by means of an "advance under this Act, the person who is the proprietor shall be "personally liable for the repayment of any sum due in respect of "the advance until he ceases to be the proprietor, by reason of "a transfer made in accordance with this Act. (2) The provisions "of this Act requiring the permission of the local authority to

" the transfer of the proprietor's interest in a house under this " Act shall not apply to any charge on that interest made by the " proprietor, so far as the charge does not affect any rights or " powers of the local authority under this Act." That is the first time there is a reference to a charge and it is worth noting that it is a charge " on that interest "—that is, the interest of the proprietor—and nothing else.

Section 5 provides for the recovery of possession and disposal of a house as follows : " (1) Where a local authority take possession of a house, all the estate, right, interest, and claim of the " proprietor in or to the house shall, subject as in this section " mentioned, vest in and become the property of the local " authority, and that authority may either retain the house under " their own management or sell or otherwise dispose of it as " they think expedient. (2) Where a local authority take possession of a house they shall, save as hereinafter mentioned, pay " to the proprietor either—(*a*) such sum as may be agreed upon; " or (*b*) a sum equal to the value of the interest in the house at " the disposal of the local authority, after deducting therefrom the " amount of the advance then remaining unpaid . . ." In the case of taking a house under that section they have power to pay something to the proprietor. By section 6 (1): " Where a local " authority order the sale of a house without taking possession, " they shall cause it to be put up for sale by auction, and out " of the proceeds of sale retain any sum due to them on account " of the interest or principal of the advance, and all costs, " charges, and expenses properly incurred by them in or about " the sale of the house, and pay over the balance (if any) to the " proprietor." That subsection obviously can have no application to the present case because the authority ordered the sale of the house without taking possession; they did not effect a sale and consequently there was no question of any payment of a balance to the proprietor. Subsection (2) provides: " If the local " authority are unable at the auction to sell the house for such " a sum as will allow of the payment out of the proceeds of sale " of the interest and principal of the advance then due to the " authority, and the costs, charges, and expenses aforesaid, they " may take possession of the house in manner provided by this " Act, but shall not be liable to pay any sum to the proprietor." I can well understand the good sense of that subsection, because if they are unable to sell after they take possession, they have no proceeds of sale, and there cannot be any question of any surplus being paid to the proprietor. It would be unfair to impose on the local authority any liability to pay a sum to the proprietor which they have not got. It has, however, been held under that section in *In re Brown's Mortgage* [1] that if subsequently, owing to the increase in value of the property, a council effects a sale which will provide a surplus over and above all the money lent, their interest and costs, they still cannot pay the proprietor anything out of the surplus which has accrued. I do not know that it follows from section 6 (2) that such a result should occur whereby the proprietor is deprived of all further interest in the property or the proceeds of sale, but, at any rate, that was the result reached by Cohen J. in that case.

Sections 7, 8 and 9 have no application to the point which I have to decide, but section 10, which may be material, provides: "(1) A person shall not be deemed for the purposes of this Act "to be resident in a house unless he is both the occupier of and "resident in that house. (2) For the purposes of this Act "'ownership' shall be such interest or combination of interests "in a house as, together with the interest of the purchaser of the "ownership, will constitute either a fee simple in possession or a "leasehold interest in possession of at least sixty years unexpired "at the date of the purchase. (3) Where the ownership of a "house is acquired by means of an advance under this Act, the "purchaser of the ownership, or, in the case of any devolution "or transfer, the person in whom the interest of the purchaser is "for the time being vested, shall be the proprietor of the house "for the purposes of this Act."

It is claimed on behalf of the defendant corporation that (because of the interests of the ratepayers, for whom they are trustees), they are not entitled to pay any part of the surplus which is in their hands to the plaintiff. The result is that she will lose the benefit of her charge and cease to have any right to recover from the proceeds of the sale of the property any part of the money which in fact she lent to the purchaser. That seems a very hard result as she was not in default in any way. The argument put forward on behalf of the defendants is this: Cohen J. held, as a result of section 6 in *In re Brown's Mortgage*,[1] that where a local authority sold after taking possession, the proprietor lost any right to share in any surplus proceeds of sale. In the same way it is said that a person who has advanced money by way of a second mortgage on the security of the property has no better title than that of the person who owns the equity of redemption in the first mortgage and as a borrower has raised money on the security of a mortgage made in favour of the local authority. A lender who advances money on a second mortgage in such circumstances must face the prospect that there may be the misfortune of the proprietor being expropriated as a result of the provisions contained in the Small Dwellings Acquisition Act, 1899. That is a very unfair result and one would not credit the legislature with such an intention, unless it was a necessary result of the provisions of the Act. It seems to me remarkable that the proprietor should be entirely expropriated, as was held in *In re Brown's Mortgage*,[2] without either the formality of a foreclosure action or anything of that sort, and without, therefore, the traditional protection afforded by the Court of Equity to a borrower who finds himself in difficulty with regard to repayment of the loan. It seems to me still more hard to expropriate a lender who has merely been deprived of repayment in the same way as the first mortgagee has been deprived of repayment. I do not think it follows from the provisions of the Act that such a result should occur. It is quite plain from sections 3 and 4 that a person having a charge may be a different person from the proprietor. I cannot see anything in the Act which requires the chargee to be deprived of a chargee's rights to repayment by reason of the default of the proprietor. Consequently, the chargee's rights remain unless disposed of by due process of law, as, for instance, by foreclosure. In the present case, therefore, the defendant local authority are accountable to the plaintiff for any balance of the money which remains in their hands from the sale of the property after the satisfaction of their own claims and paying the amount of the principal, interest and costs of the charge.

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[1] [1945] Ch. 166; [1945] 1 All E.R. 397.

Declaration accordingly.
Plaintiff to have costs.

Solicitors: *H. W. Pegden; Gordon H. Taylor.*

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[2] [1945] Ch. 166.

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March 2, 3,
4, 7, 8, 24.

Lord Evershed M.R.,
Pearce and
Harman L.JJ.

MITCHELL AND EDON (INSPECTORS OF TAXES) *v.* ROSS.

MITCHELL AND HADDOCK (INSPECTORS OF TAXES) *v.* HIRTENSTEIN.

MITCHELL AND MELLERSH (INSPECTORS OF TAXES) *v.* MARSHALL.

TAYLOR-GOOBY (INSPECTOR OF TAXES) *v.* TARNESBY.

TAYLOR-GOOBY AND JOB (INSPECTORS OF TAXES) *v.* DREW.

Revenue —Income tax — Employment — Medical specialist — National Health Service—Part-time appointment with regional hospital board —Assessment—Whether appointment an " office "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schs. D, E (as amended by Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 122, 137 (*a*), 156.

Revenue — Income tax — Expenses — Medical specialist — Part-time appointment under Schedule E—One profession—Whether all professional expenses deductible under Schedule D.

The National Health Service Act, 1946, " An Act to provide " for the establishment of a comprehensive health service for " England and Wales and for purposes connected therewith," by section 3 (1), laid upon the Minister of Health the duty to provide, inter alia, the services of specialists, whether at a hospital, a health centre, a clinic, or at the home of the patient. The Minister carried out his duties by delegating certain of them to Regional Hospital Boards which, subject to regulations and directions made by the Minister, administered the hospital and specialist services in their area and appointed the officers required to be employed for those purposes. The Act provided that such officers should be officers of the board and that their remuneration, subject to regulations, was to be determined by the board; two categories, consultants and senior hospital medical (or dental) officers, constituted the " specialists " of the service. Specialists might hold whole- or part-time appointments; they might have private patients, undertake " locum tenens " work in respect of a National Health Service appointment and lecture to students. In addition to their ordinary duties they might make domiciliary visits to patients within the area laid down in their contract; for such visits a specialist took his own apparatus to the patient's home, examined him and reported to the general practitioner.

Five specialists, holding part-time appointments under the National Health Service, appealed to the special commissioners against, inter alia, certain assessments to income tax under

Schedule E on the ground that, in computing their profits or gains for the relevant years, their remuneration in respect of such appointments, and payments made in respect of domiciliary visits to patients under the service, had been wrongly included and should have been assessed under Case II of Schedule D. The commissioners found that the part-time appointments were offices within the meaning of Schedule E to the Income Tax Act, 1918,[1] and section 156 of the Income Tax Act, 1952, and that the remuneration therefrom accordingly came under the dominance of that Schedule, but that since the appointments were a necessary part of the exercise of their profession by the specialists, who each carried on one profession and not two, and were merely incidental thereto, the remuneration fell to be assessed as part of their professional earnings under Schedule D.[2] The commissioners' decision was reversed by Upjohn J. On appeal:—

Held, (1) that a specialist's hospital appointment under the National Health Service Act, 1946, constituted an "office" under section 156, paragraph 2 of the Income Tax Act, 1952, within Schedule E (post, p. 523).

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[1] Income Tax Act, 1918, Sch. E: "Tax under Schedule E shall be "charged in respect of every public "office or employment of profit. . . . "6. The tax shall be paid in respect "of all the public offices and "employments of profit . . . herein-"after respectively described, namely ". . . (*k*) all other public offices, or "employments of profit which are of "a public nature."

Finance Act, 1922, s. 18 (1): "Such "profits or gains arising or accruing "to any person from an office, "employment or pension as are, "under the Income Tax Act, 1918, "chargeable to income tax under "Schedule D . . . shall cease to be "chargeable under that schedule and "shall be chargeable to tax under "Schedule E, and the rules appli-"cable to that schedule shall apply "accordingly subject to the provisions "of this Act."

Income Tax Act, 1952, s. 156: "The Schedule referred to in this "Act as Schedule E is as follows— "Schedule E: 1. Tax under this "Schedule shall be charged in respect "of every public office or employment "of profit. . . . 2. Tax under this "Schedule shall also be charged in "respect of any office, employment or "pension the profits or gains arising "or accruing from which would be "chargeable to tax under Schedule D "but for the proviso to paragraph 1 of "that Schedule."

[2] Income Tax Act, 1918, Sch. D, para. 1: "Tax under this Schedule "shall be charged in respect of— "(*a*) the annual profits or gains aris-"ing or accruing— . . . (ii) to any "person . . . from any trade, profes-"sion, employment, or vocation. . . ."

Income Tax Act, 1952, s. 122: "The Schedule referred to in this Act "as Schedule D is as follows— "Schedule D: 1. Tax under this "Schedule shall be charged in respect "of—(*a*) the annual profits or gains "arising or accruing— . . . (ii) to any "person . . . from any trade, profes-"sion, employment or vocation . . . "Provided that profits or gains "arising or accruing to any person "from an office, employment or pen-"sion shall not, by virtue of this "paragraph, be chargeable to tax "under this Schedule unless they are "chargeable to tax under Case V of "this Schedule or under Chapter IV "of Part VII of this Act."

S. 137: " . . . in computing the "amount of the profits or gains to be "charged under Case I or Case II of "Schedule D, no sum shall be "deducted in respect of—(*a*) any dis-"bursements or expenses, not being "money wholly and exclusively laid "out or expended for the purposes of "the trade, profession or voca-"tion. . . ."

Great Western Railway Co. v. *Bater* [1922] 2 A.C. 1; 38 T.L.R. 448; 8 T.C. 231, H.L.; [1920] 3 K.B. 266; and *McMillan* v. *Guest* [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190, H.L. considered.

Davies v. *Braithwaite* [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198 distinguished.

Semble, per Harman L.J., a specialist's hospital appointment was also a "public office" within Schedule E.

(2) That the domiciliary consultations which a specialist undertook were part of the duties of his "office."

(3) That the duties undertaken by a specialist as locum tenens during the temporary absence of a part-time consultant were essentially in pari materia with the appointment of a consultant at a hospital and were the duties of an office.

(4) That on the true construction of section 137 (*a*) of the Act of 1952 the word "profession" must not be confined to that profession, or part of it, the profits or gains arising from which were taxable under Schedule D and, since a specialist, on the facts, carried on one single profession, sums wholly and exclusively expended for the purposes of that profession were deductible in the Schedule D assessment, and nonetheless so because they might have been attributable to his hospital appointment and would not, wholly or partly, be allowed in the assessments of the emoluments of that appointment under Schedule E (post, pp. 523–524, 528, 533).

Fry v. *Salisbury House Estate Ltd.* [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266, H.L. and *Hughes* v. *Bank of New Zealand* [1938] A.C. 366; 54 T.L.R. 542; 21 T.C. 472; [1938] 1 All E.R. 778, H.L. considered.

Decision of Upjohn J., ante, p. 145; [1959] 3 W.L.R. 550; [1959] 3 All E.R. 341 reversed in part.

APPEALS from Upjohn J.[3]

The first and main appeal was in respect of Dr. Harold Leslie Ross, who for the relevant years of assessment held a part-time appointment as a consultant radiologist to the Birmingham Regional Hospital Board. The second appeal was in respect of Dr. Arnost Hirtenstein, who held a part-time appointment as a consultant ophthalmologist to the Birmingham Regional Hospital Board, and also undertook certain lecture work to nurses. The third appeal was in respect of Dr. Alfred Gordon Marshall, who held a part-time appointment as consultant pathologist to the Birmingham Regional Hospital Board. The fourth appeal was in respect of Dr. Herman Peter Tarnesby, who held two part-time appointments as a psychiatrist, one with the North West Metropolitan Regional Hospital Board and one as clinical assistant in the Department of Psychological Medicine of the West London Hospital, a teaching hospital. He also undertook work as a locum tenens in respect of National Health appointments. The fifth appeal was in respect of Charles Edwin Drew, who held three appointments as a consultant thoracic surgeon, one with the Westminster Hospital, a teaching hospital, another with the South West Metropolitan Regional Hospital Board, and the third as chief assistant at the Brompton Hospital for Diseases of the Chest. He also undertook certain locum tenens work in respect of National Health appointments and in addition lectured to medical students.

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[3] Ante, p. 145; [1959] 3 W.L.R. 550; [1959] 3 All E.R. 341.

The consultants all had private patients.

The following are extracts from the case stated, as amended, in respect of Dr. Ross; the other cases, which raised similar questions of principle, are not set out.

At meetings of the Commissioners for the Special Purposes of the Income Tax Acts held on March 23, 26, 27, 28, and April 23, 24, 25, 1956, and April 23, 1957, Dr. Harold Leslie Ross (hereinafter called " the taxpayer ") appealed against assessments to income tax under Schedule E for the years 1951–52, 1952–53, and 1953–54, and under Schedule D for the years 1952–53, 1953–54 and 1954–55.

The grounds of the appeal were, first, as regards the assessments made under Schedule E, that, in computing the taxpayer's profits or gains for the accounting periods relative to the assessments under appeal, his remuneration as a consultant radiologist under the Birmingham Regional Hospital Board and payments made to him in respect of domiciliary visits had been included contrary to law, and that the assessments should be reduced accordingly, and, secondly, as regards the assessments made under Schedule D, that the assessments being estimated should be adjusted in accordance with the accounts of the profits or gains of the respondent for the accounting periods relative to the assessments.

The following conclusions of mixed fact and law were agreed between the parties: (1) The National Health Service Act, 1946 (" the Act ") laid upon the Minister of Health (" the Minister ") the duty to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness; and for that purpose the Minister was under a duty to provide or

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secure the effective provision of services in accordance with the Act [s. 1 (1) (2)]. The services provided included hospital and specialist services.

Subject to the exercise of functions by hospital management committees, it was the duty of a regional hospital board, "subject "to and in accordance with regulations and such directions as "may be given by the Minister, generally to administer on behalf "of the Minister the hospital and specialist services provided in "their area," and, in particular, to appoint officers required to be employed at or for the purposes of any hospital providing such services, other than a teaching hospital [s. 12 (1)].

The qualified medical staff of the hospital service was divided into a number of different categories, two of which were: (a) consultants; (b) senior hospital medical (or dental) officers. These two categories constituted the "specialists" of the service.

Some of the consultants in the service held whole-time appointments. The great majority of the consultants, however, only held part-time appointments.

In 1951 formal regulations under section 66 of the Act were made by the Minister, being the National Health Service (Remuneration and Conditions of Service) Regulations, 1951 [S.I. 1951, No. 1373], and were in very general form.

The terms of service for specialists made under section 66 provided for the method of calculation of the remuneration of specialists and provided for the fees payable for exceptional consultations, and for fees payable for locum tenens work. The terms of service also controlled the remuneration in respect of domiciliary consultations. Domiciliary work was independent of and different from the part-time consultant's work under his ordinary appointment with the regional hospital board. The domiciliary consultation was a visit by the consultant to a patient in his home at the request of the patient's general practitioner.

The terms of service dealt with private practice and retention of fees, and also gave the right to reimbursement of travelling, subsisting and other expenses to a specified extent.

A part-time consultant (whether honorary or paid) on the staff of a hospital providing hospital and specialist services might make arrangements for the treatment of his private patients at that or any other such hospital, and the hospital might make special accommodation available for that purpose [s. 5 (2)].

All general practitioners were assessed under Case II, Schedule D, in respect of their general practice in the service.

Apart from and in addition to the foregoing, the special commissioners found the following facts admitted or proved on the evidence adduced at the hearing of the appeal: (1) In the medical profession the normal way in which an individual became recognised as a "consultant" was by being appointed to the staff of a hospital as physician or surgeon (or a corresponding post). This was a recognition of his professional ability. The work of a consultant was the practice of his own special branch of medicine on cases sent to him by other doctors. Before the introduction of the National Health Service, it was usual for consultants to have a private practice as such apart from their hospital appointments. Except in the case of hospitals run under the Public Health Act, 1936, and ex gratia payments from voluntary hospitals, it was not usual for consultants to receive payment for their hospital work. After the introduction of the National Health Service, consultants taking part in this service were paid in the manner hereinbefore referred to, but it remained the usual practice for part-time consultants to have a private practice, apart from their hospital appointments, though the volume of private work throughout the country declined. Apart from geographical limitations, consultants were free to take up part-time appointments with different regional hospital boards, payment being received from each in accordance with the amount decided by the Central Bureau, London, but subject to the maximum remuneration for part-time appointments laid down in the "Terms and Conditions of Service of Hospital, Medical "and Dental Staff (England and Wales)."

(2) Both before and after the introduction of the National Health Service, the holder of an appointment on the staff of a hospital obtained definite advantages, in that it gave him professional prestige, and provided him with plenty of opportunity for developing and perfecting his skill. After the introduction of the National Health Service only those consultants who took part in that scheme were permitted to take a patient into a private bed in any of the hospitals under the Ministry of National Health and thus obtain for him the services of the nursing staff and the use of the apparatus in the hospital. The same facilities were available at only a few nursing homes.

(3) At all material times the taxpayer was a registered medical practitioner in the United Kingdom, specialising in radiology. He was a Bachelor of Medicine, a Bachelor of Surgery,

a Master of Radiology, and held a diploma in Medical Radio Diagnosis.

(4) On March 1, 1950, he commenced a private practice as a consultant radiologist.

(5) On March 1, 1950, the taxpayer obtained a part-time appointment as a consultant radiologist under the Birmingham Regional Hospital Board to the hospital of St. Cross, Rugby, the Keresley Hospital and the Gulson Hospital. The terms of the appointment were set out in a letter which was dated November 9, 1950, and contained a schedule detailing the hospitals and hours of work required at each. At the end of the letter a form of acceptance was attached which the taxpayer signed. Also attached to the letter was a form of undertaking in connection with domiciliary consultations which he signed.

(6) The taxpayer interviewed his private patients either at his consulting rooms, or at any of the hospitals to which he was attached, or in nursing homes, or in their own private homes. At his consulting rooms at his house the taxpayer kept for professional purposes a desk, filing cabinets, portable X-ray apparatus, screens, a typewriter, telephone and a library of books of reference. He also had a dark room for developing films. The taxpayer also had a car which he used in his professional duties. When he required the use of hospital apparatus and film for a private patient in hospital he paid a fee of two guineas.

(7) The taxpayer also had need of and employed secretarial assistance in his private practice and also in connection with his undertaking to carry out domiciliary visits. The services of a secretary were also useful in connection with his hospital work and for receiving telephone calls from the hospitals.

(8) Upon taking up his appointment under the Birmingham Regional Hospital Board, the taxpayer contacted the consultant radiologist at the hospital of St. Cross, Rugby, and arranged with him the best way of covering the radiological work at Rugby. It was agreed between them that the taxpayer should do two sessions at Gulson Hospital and seven sessions at St. Cross Hospital, but that the work at Keresley Hospital should be done by the other consultant radiologist in Rugby and by the consultant radiologist in Coventry. No permission was sought from or given by any of the administrative officials of the hospital for this arrangement.

(9) The taxpayer was solely responsible for the radiological work at St. Cross Hospital, Rugby, which he attended on four

mornings a week. During this time he attended to National Health Service patients . . . and also to private patients, either in the paying bed section of the hospital, the private wing, or private out-patients.

(10) At Gulson Hospital three consultant radiologists, including the taxpayer, were responsible for the radiological work which they arranged between them to their mutual convenience so as to dovetail in their work at the hospital. The taxpayer was entirely responsible for deciding what radiological work he should do and how he should do it.

(11) A domiciliary visit was usually inaugurated by a telephone message from a general practitioner to the taxpayer's house which was received by his secretary. Upon receipt of such message, he loaded his portable X-ray apparatus into his car and proceeded to the place of consultation. After taking the necessary pictures he returned either to hospital or to his consulting rooms and proceeded at once to develop the film himself (usually in hospital). He usually informed the general practitioner concerned of the result the same day. The film used for domiciliary visits was provided by the Ministry of Health, and that used for private patients by the taxpayer himself. Domiciliary visits were usually undertaken between 5.30 and 8.30 p.m., i.e., after the afternoon session at a hospital, and at a time when general practitioners could very often be present. For each domiciliary visit carried out, up to a maximum of 200 in any year, the taxpayer received a fee of four guineas plus two guineas for the use of his apparatus; the latter fee being payable only once per patient. . . .

5. It was contended on behalf of the taxpayer: (i) that his activities as a consultant radiologist constituted the carrying on of a profession and the entirety of the profits and gains arising from those activities was therefore assessable to income tax under Case II of Schedule D and not otherwise; (ii) that the part-time appointments he held were not offices or employments within the meaning of Schedule E; (iii) that, if any such part-time appointment was an office or employment within the meaning of Schedule E, the tenure thereof was an incident in the course of the carrying on by him of his profession as a consultant radiologist, and any remuneration arising therefrom constituted a receipt of that profession to be included in computing the profits or gains thereof for the purposes of assessment to income tax under Schedule D; and, accordingly, (iv) that the assessments under Schedule E should be reduced accordingly, and the assessments under Schedule D

should be adjusted to correspond with the figures shown in the taxpayer's accounts; and, in the alternative, (v) that if the assessments under Schedule E were in principle well founded, the outgoings shown in his accounts were allowable deductions in computing his profits or gains assessable under Schedule D, in so far as they were not allowable as expenses under Schedule E; and, in any event, (vi) that any profits or gains arising to the taxpayer in respect of domiciliary visits were properly to be regarded as profits or gains of his profession assessable under Schedule D and not as emoluments of offices or employments assessable under Schedule E.

6. It was contended on behalf of the Crown: (i) that the taxpayer's remuneration as consultant radiologist under the Birmingham Regional Hospital Board was properly to be included in the assessments in question made upon him under Schedule E; (ii) that the payments made to him by the said board in respect of his part-time appointment as a consultant radiologist under the National Health Service Act, 1946, constituted remuneration received by him in respect of an office or employment of profit within the meaning of Schedule E; (iii) that he exercised a profession or vocation in respect of which he was assessable under Case II, Schedule D, only in so far as he carried on a private practice as consultant radiologist outside the National Health Service; (iv) that in computing the profits of the taxpayer under Schedule E in respect of his said part-time appointment, only such expenses as were allowable under the said Schedule and the rules applicable thereto were deductible, and in computing his profits or gains under Case II, Schedule D, in respect of his said private practice, only such expenses as were allowable under the Schedule and case and the rules applicable thereto were deductible, and the outgoings shown in his accounts fell to be dealt with accordingly; (v) that the payments made to the taxpayer under the National Health Service Scheme in respect of domiciliary consultations in the course of his part-time appointment were properly to be regarded as emoluments of an office or employment assessable under Schedule E and not as profits or gains assessable under Schedule D; and (vi) that the appeal should be dismissed and the assessments confirmed or adjusted in accordance with the appropriate figures.

7. The commissioners gave their decision in principle on July 31, 1956, in the following terms: . . .

(4) Upon consideration of the evidence adduced and arguments addressed to us on behalf of the parties, we find that each of

Dr. Ross's part-time appointments as consultant radiologist to certain hospitals under the Birmingham Regional Hospital Board was an office, and the remuneration derived therefrom, together with the fees received in respect of domiciliary consultations carried out in connection therewith, was the profit of an office within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952. It is immaterial for the purpose of determining this appeal to find whether or not such office is a public office within the meaning of the charging rule of Schedule E of the Income Tax Act, 1918, and section 156 of the Income Tax Act, 1952, and we express no opinion. Furthermore, finding as we do that the part-time appointments which Dr. Ross held as aforesaid constituted the holding of offices, it is unnecessary for the purpose of determining this appeal to find whether or not the hospital appointments also constituted an employment within the meaning of Schedule E of the Income Tax Act, 1918 (as amended by section 18 of the Finance Act, 1922), and section 156 of the Income Tax Act, 1952, and again we express no opinion. We also find that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointments being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. We do not seek to describe the profession of consultant radiologist in general.

(5) We next have to decide the correct method of assessing the profits or gains which Dr. Ross derived from his hospital appointments. Having regard to the decision in *Fry* v. *Salisbury House Estate Ltd.*[4] and, in particular, to the judgment of Lord Atkin,[5] it would seem, prima facie, that remuneration received by Dr. Ross from his various hospital appointments, being, as we have found, derived from the holding of offices, must come under the dominance of Schedule E, to the exclusion of other Schedules, neither Dr. Ross nor the Crown having any option in the matter. We have, however, to consider what effect, if any, the decisions in the cases of *Davies* v. *Braithwaite*[6] and *Household* v. *Grimshaw*[7] have upon this view. In the first place, the *Salisbury House Estate* case[8] can, we think, be distinguished because it

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[4] [1930] A.C. 432, 457; 46 T.L.R. 336; 15 T.C. 266.

[5] [1930] A.C. 432, 452.

[6] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[7] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

[8] [1930] A.C. 432.

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dealt only with the mutual exclusiveness of Schedules A and D, whereas the cases of *Braithwaite* [9] and *Household* [10] were concerned with professional earnings falling within Schedule D and Schedule E. In the second place, the *Braithwaite* [11] and *Household* [12] cases were decided after the decision in the *Salisbury House Estate* case [13] had been given and we are, therefore, entitled to assume that they are reconcilable with the latter. We think that the decisions in the cases of *Braithwaite* [14] and *Household* [15] are authority for the principle that an individual may have an engagement or hold a post in the same line as his profession at large, but that the contract governing such engagement or post may nevertheless be nothing but an incident in the conduct of his professional career. In such a case we think we would be bound by the authorities to hold that the profits or gains arising therefrom fell to be assessed as part of his professional earnings under Schedule D. Applying this principle to our findings in the present case, we hold that the remuneration received by Dr. Ross from his various part-time hospital appointments falls to be assessed under Case II of Schedule D as part of the profits or gains of his profession, and so also do the fees received by him in respect of domiciliary consultations.

(6) The appeal therefore succeeds against the Schedule E assessments in so far as they relate to Dr. Ross's personal remuneration, and it is unnecessary for us to consider further what, if any, expenses incurred by Dr. Ross would fall to be set against such assessments. We adjourn the appeal against the remaining assessments for consideration and agreement of the figures by the parties on the basis of this our decision in principle.

The Crown appealed; the point of law stated for the opinion of the High Court being whether, on the facts found by the commissioners, there was any evidence upon which they could properly arrive at their decision, and whether, on the facts so found, their determination of the appeal was correct in law.

Upjohn J. allowed the Crown's appeal. He held that a specialist carrying on duties under a part-time National Health Service appointment was the holder of a public office, the profits and gains of which fell to be assessed under Schedule E, and the expenses attendant thereon must be deducted under the rules applicable to that schedule. When attending private patients a specialist was exercising his profession, the profits or gains from which were to be assessed under Schedule D.

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[9] [1931] 2 K.B. 628.

[10] [1953] 1 W.L.R. 710.

[11] [1931] 2 K.B. 628.

[12] [1953] 1 W.L.R. 710.

[13] [1930] A.C. 432.

[14] [1931] 2 K.B. 628.

[15] [1953] 1 W.L.R. 710

The taxpayers appealed.

Heyworth Talbot Q.C. and *J. L. Creese* for the taxpayers. These appeals raise important questions affecting the tax liabilities of some 4,700 medical practitioners who carry on private practice and also hold part-time hospital appointments in the National Health Service. It is not disputed that the taxpayers have to be assessed under Case II of Schedule D in respect of the earnings from their private practices, but the Crown contends that in respect of their earnings from their hospital appointments they must be assessed under Schedule E. If the Crown's contention is right, these taxpayers will be denied the right to deduct part of their expenses which are incurred in connection with their hospital work. This follows from the peculiarity of the deductions permitted in the case of Schedule E assessments, which are more limited than the deductions allowed in the case of earnings falling within Schedule D. The taxpayer's main contention is that all his professional activities constitute carrying on one profession. It matters not that his remuneration from his appointments exceeds that from his private practice. It follows that all his earnings should be assessed under Schedule D and that there should be no assessment under Schedule E. It is impossible for any medical specialist today to establish himself in private practice if he does not hold hospital appointments under the National Health Service Act, 1946. This is because by holding a hospital appointment: (a) the specialist obtains introductions to general practitioners who send to him private patients; (b) it is only specialists at a hospital who may have private beds for their patients in the hospital; (c) it is only by such appointment that a specialist can get practice in exercising his especial skill. Accordingly, the main contention of the taxpayers is that private practice and specialist practice under the National Health Service are so closely knit that only one profession is being carried on. The appointments under the National Health Act are incidental to that one profession. In any event, the taxpayers contend that the fees received in respect of domiciliary visits, fees for holding locum tenens and lecturing fees are not earnings of an office.

If the taxpayers' main contention fails, it is contended, in the alternative, that even if part of their earnings fall to be assessed under Schedule E, the whole of their expenses, whether incurred in respect of their hospital appointments or in respect of their private practice, are allowable deductions in computing their profits chargeable under Schedule D, save to the extent to which they have been allowed as Schedule E expenses. It is conceded that if a hospital appointment constitutes the holding of an office, then there must be a Schedule E assessment.

There is a distinction between an office and a public office. This appears from the history of the legislation. Originally only public offices were taxed under Schedule E: see Income Tax Act, 1918, Sch. E, rr. 1 and 9. After the decision in *Great Western Railway Co.* v. *Bater*[16] ordinary employments and offices were transferred to Schedule E: see Finance Act, 1922, s. 18, now Income Tax Act, 1952, s. 156. These taxpayers do not hold offices of employment. There is a distinction between contracts of service and contracts for services. These taxpayers are not employees but independent workers.

Three matters were removed from controversy as a result of the findings of the commissioners: (a) a consultant exercises a profession; (b) hospital appointments are a necessary part of the exercise of their professions by the taxpayers; (c) such appointments are incidental to the exercise of the profession. These findings are findings of fact which are unassailable, unless there was no evidence to justify them. They bring the earnings of these taxpayers within the charging words of Case II of Schedule D: see section 122 (*a*) (ii) of the Act of 1952. It is not disputed that the expenses in question are proper deductions from the profits or gains of a profession. Profits from an office or employment are taken out of Schedule D by the proviso to section 122 (1), but these hospital appointments were neither "offices" nor "employments" within Schedule E.

There is no basic difference between a specialist and an actress; both have engagements which are incidental to the conduct of their professions. *Davies* v. *Braithwaite*[17] applies to this case. Here there is not the relationship of employer and employee. These specialists were not subject to day-to-day directions as to how they were to do their work: see *In re National Insurance Act, 1911.*[18] What is an office appears from *Great Western Railway Co.* v. *Bater.*[19] These appointments were neither offices nor public offices.

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[16] [1922] 2 A.C. 1; 38 T.L.R. 448; 8 T.C. 231.

[17] [1931] 2 K.B. 628.

[18] [1912] 2 Ch. 563.

[19] [1922] 2 A.C. 1.

The decisions under the Workmen's Compensation Acts are of no assistance. These taxpayers were subject to contracts to provide services rather than contracts of service. [Reference was made to *McMillan* v. *Guest* [20] and *Household* v. *Grimshaw*.[21]] If there is here a continuing professional activity apart from any employment, then these taxpayers are not within Schedule E.

The alternative contention that even if there must be a Schedule E assessment, nevertheless all expenses not allowable under Schedule E are deductions in computing profits taxable under Schedule D is supported by the decision in *Hughes* v. *Bank of New Zealand*.[22] That case shows the position where a trader taxable on his profits under Schedule D was trading in and taxed under another Schedule. This is a stronger case. [Reference was also made to *Reg.* v. *Shacter*.[23]]

J. L. Creese following. If a hospital appointment constitutes an office, the domiciliary work and the work as a locum tenens, which is not compulsory on the holder of a hospital appointment, does not. This work is akin to that of a private practitioner.

R. O. Wilberforce Q.C., *E. Blanshard Stamp* and *Alan Orr* for the Crown. The judgment of Upjohn J. is correct. The taxpayer may be taxed under five heads of charge, the same taxpayer being taxed under different Schedules. In 1922 offices and employments were transferred from Schedule D to Schedule E. It is submitted: (1) That a part-time appointment to a hospital is within the term "office" or "employment." If it is an office, it is a "public office." (2) If the appointment is an office, it is also an "employment." (3) If the appointment is an "office" or "employment," it is not the less so because it is related to private practice in the manner found by the commissioners.

If there are earnings here which are taxable under Schedule E, the fact that there are also earnings from a private practice cannot take earnings which are within Schedule E out of it. If the hospital appointments are analogous to an office, they are inescapably within Schedule E. They can only escape, if the employment does not have the character of an engagement. There was a series of employments in the *Braithwaite* case.[24] An actor's work is sporadic. The findings in this case plainly distinguish it from that case. There was no question there of an office and the judge did not find that there was any employment.

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[20] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.

[21] [1953] 1 W.L.R. 710.

[22] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.

[23] [1960] 2 W.L.R. 258; [1960] 2 All E.R. 61.

[24] [1931] 2 K.B. 628.

Liability to tax does not depend on motive or purpose; the test is objective. What is the taxpayer doing in fact? At all material times Dr. Ross exercised the profession of a radiologist. This is a case of a man carrying on his professional activities in a job. There is no difference between him and the man who has a job and undertakes as well other activities. [Reference was made to *Nicoll (Inspector of Taxes)* v. *Austin.*[25]] Once a source of profit is within Schedule E, it cannot be brought within Schedule D. There can be two activities. This is not the same case as *Fry* v. *Salisbury House Estate Ltd.*[26] [Reference was also made to *Hughes* v. *Bank of New Zealand.*[27]]

[Counsel was stopped when arguing that the appointments were "offices" or "employment," the court indicating that it was satisfied on that point.]

If it is held that a specialist's appointment is an office, it is not necessary to consider whether it is a "public" office.

With regard to the taxpayers' second point—that expenses not allowed under Schedule E can be charged against the assessment under Schedule D on the ground that these are professional expenses—this is an attempt to get by the back door what cannot be got by the front. The suggestion is revolutionary. Once it is established that there are two heads of charge, then the net profits under each head can only be determined under the appropriate Schedule. The Schedule D and the Schedule E codes are distinct. It is a fallacy to suggest that the taxpayers have each one profession. The expenses incurred in respect of the Schedule D activity can be charged under section 122 (1) of the Act of 1952 against the earnings taxed under that Schedule, but expenses incurred in respect of the Schedule E activities cannot be charged against the Schedule D earnings. In the *New Zealand Bank* case [27] there was only one trade and one source of taxable income, not two. One starts here from the position that there is not one profession for tax purposes but two. The expenses in respect of one head of charge cannot be carried to another. For example, if a doctor claims relief for repairs under Schedule A, he cannot charge any deficit against his Schedule D profits.

One has first to find out what is the permissible deduction in accordance with paragraph 7 of the Ninth Schedule, and then one arrives at what is charged under Schedule E. Then one finds that the taxpayer is also carrying on activities of his private practice; these other sources of profit are taxed under section 122 of Schedule D and the only deductions that can be made under that Schedule are the expenses which are wholly referable to those activities.

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[25] (1935) 19 T.C. 531.

[26] [1930] A.C. 432.

[27] [1938] A.C. 366.

It may be fantastic to have to divide the single profession under two Schedules, but if that can be done, then logically one should also be able to divide the expenses. The same problem would arise in the case of a teacher who does private coaching, etc., in addition to holding an office or employment. In the *New Zealand Bank* case [27] there was one indivisible trade; here the sources of the income are divisible and it is immaterial that one source is incidental to the other or in a sense part of that profession because the part has been segregated and put into another part of the taxing machine.

There may be difficulties in practice in dividing the expenses between the two Schedules—for example, a secretary may be used partly for private practice and partly for a hospital appointment, or a journey by car may be necessary for the purpose of visiting both private and hospital patients, but such difficulties in application should not be taken into account in deciding what is the correct theory. In practice a rough and ready appropriation may have to be made.

Fry v. *Salisbury House Estate Ltd.*[28] is the exact converse of the present case, but what was said there is applicable. The taxpayer cannot say that expenses which he cannot bring in under one Schedule can be claimed under another. The principle applicable between Schedules D and E is similar to that as between A and E: see *Tennant* v. *Smith.*[29]

A consultant is, whilst acting as a locum tenens, a substitute holder of the particular office, and it is part of the duties which he is required to perform by his own contract. Similarly, in making domiciliary visits the consultant is carrying out a contractual obligation of all whole-time consultants. The fees for such visits are a perquisite of the appointment as a part-time consultant and were emoluments of an office assessable under Schedule E.

In so far as the functions are those of a public office, the emoluments in respect of these functions are taxed under Schedule E, and the code of that Schedule includes allowances which apply exclusively to that part of the work, which is for all purposes taken out of Schedule D. It follows that the expenses exclusively referable to that part of the work can only be allowed if they fall within the scope of the Ninth Schedule. The onus is on the taxpayer to show that an expense is properly deductible.

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[27] [1938] A.C. 366.

[28] [1930] A.C. 432.

[29] [1892] A.C. 150; 8 T.L.R. 434; 3 T.C. 158, H.L.

E. Blanshard Stamp following. The real distinction drawn by the section is between the two types of profit. Taxation under Schedule E is on the net amount of the emoluments and under Schedule D on the annual profits and gains of the profession. The proviso to section 122 prevents the profits relating to the emoluments of the hospital appointment from being taxed under Schedule D. Section 137 is not an exhaustive list of permissible deductions; it is merely directed to the method of computing the subject-matter to be taxed, i.e., the profits brought into charge under Cases I and II of Schedule D. Tax under Schedule E is charged on a balance after making out an account. The fact that the hospital appointment is a necessary incident to the profession as a consultant is nihil ad rem—one is only concerned with the computation of profit. One has still to take out two accounts. Nothing in the statutory language justifies the submission that a sum which is not deductible in taking the account under Schedule E can be brought in under Schedule D.

Heyworth Talbot Q.C. in reply. The Crown has not submitted that these appointments are public offices and the commissioners have not so found. Schedule E liability arises once it is held that this is an office or employment of profit. What has to be ascertained is the total profits and gains arising from the profession comprising both the appointments and the private practice. Then one has to see how much of these falls to be excluded from the Schedule D computation. By the proviso only the profits and gains arising from the office or employment are to be excluded—that is a net figure arrived at after deduction of expenses. The office itself is not excluded from the scope of the profession. There is no ground for limiting the deductions allowable under section 137 by excluding those attributable to the Schedule E activities. All these expenses are incurred wholly and exclusively for the purposes of the profession. The procedure is analogous to that applied to banks and financial concerns. In such a case all the income taxable under Schedule C has to be excluded from Schedule D, but it is plain that all the expenses incidental to the acquisition of profits come off under Schedule D: *Hughes* v. *Bank of New Zealand*.[30] The income from taxed dividends is not taxed under Schedule D, but all expenses are allowed.

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[30] [1938] A.C. 366.

The fees for the domiciliary visits were something additional to the money's worth coming to a person virtute officii and were part of the profits of the profession as a whole. They were not an emolument of the office.

Cur. adv. vult.

March 24. The following judgments were read.

LORD EVERSHED M.R. The five appeals in which we are now giving judgment have raised the same questions, in substance two in number. For the purposes of the hearing in this court, as for the purposes of the hearing before Upjohn J., as he then was, the facts in the case of Dr. Ross have been taken as typical of all five cases, and I shall therefore, as did the judge, treat the facts relating to Dr. Ross, appearing from the case stated by the special commissioners upon Dr. Ross's appeal against the assessments made against him, as typical of the facts relevant to all the appeals, and therefore as constituting the necessary basis for this judgment upon all the appeals.

The material circumstances are set out most fully in the case stated, which contains also an analysis of the relevant provisions of the National Health Service Act, 1946, and of various statutory instruments made thereunder. Like the judge, therefore, I shall confine myself to such brief statement of facts as will suffice to make clear the nature of the questions for our decision and the reasons for my conclusions upon them.

Dr. Ross is, and has at all material times been, a qualified and registered medical practitioner. He is, and has at all material times been, in common with the other appellants, of the category of medical practitioners known as "specialists." The word is so commonly understood that it requires no further exposition. It is used in its commonly understood sense (and so as to be applicable to Dr. Ross and the other appellants) in the Act of 1946 itself, particularly in sections 3 and 14. Dr. Ross's specialist activity is that of a consultant radiologist. In that capacity he attends private patients, and he also holds a part-time appointment by contract with the Birmingham Regional Hospital Board at certain hospitals in the area of the board. The professional activities of the other appellants are in all material respects wholly similar. The only difference between them is that whereas in the case of Dr. Ross and three of the other appellants the fees received in the relevant years of assessment from private patients were appreciably less than the emoluments from the hospital appointments, in the case of the remaining appellant, Dr. Hirtenstein, the fees from private patients exceeded the hospital emoluments. But no point was made before us arising out of the distinction.

I can now state the first of the questions debated before us. It is this: Should Dr. Ross be assessed for income tax in respect of the profits or gains or emoluments arising to him from his practice as a consultant radiologist, alike from his private patients as from the hospital appointment, entirely under the relevant rules of Schedule D? Dr. Ross's contention is that he should. Or, as the Crown contends, should he be assessed under Schedule D in respect of the profits or gains arising from his private patients and under Schedule E in respect of his emoluments under his hospital appointment? I have so far deliberately, and for reasons which will later sufficiently appear, avoided the use of the word "profession"; but it has not been in dispute that Dr. Ross's profits or gains from his services to private patients and his emoluments from his hospital appointment alike arose from his practice, his one "job in life," as a consultant radiologist.

I should assume that nine people out of every ten—indeed, that everyone not versed or experienced in the intricacies and anomalies that the heritage of a century and a half of income tax legislation has bequeathed—would, upon hearing the questions that I have posed, inquire: "What can it matter? Why should "it matter?" And emphasis is given to the inquiry by the commissioners' finding that Dr. Ross's part-time hospital appointment, no less than his private practice, was a part, and indeed a "necessary" part, of his profession as a consultant radiologist. The actual language of the finding, supplemented after the case had been sent back to them by Roxburgh J. for the purpose, was as follows: "We also find that at all material times Dr. Ross "exercised the profession of consulting radiologist, his part-"time hospital appointments being a necessary part of the exer-"cise of that profession by him and merely incidental thereto, "notwithstanding that a great deal of his time was thereby taken "up. We do not seek," they added, "to describe the profession "of consulting radiologist in general." There was some discussion before us of the exact significance of the language I have quoted, which Upjohn J. described as not entirely happy. But this much was quite clear and not in dispute: that for one in Dr. Ross's position, who was earning his living as a consultant radiologist, the undertaking of part-time hospital appointments was part of his "job" (and again I deliberately do not use the word "profession")—and a part of it which, as a matter of practical necessity for professional success, he had to do. And the same is true of the other four appellants, save for the substitution for "consultant radiologist" of their respective specialist activities.

Why, then, should it matter whether Dr. Ross is assessed wholly under Schedule D or partly under that Schedule and partly under Schedule E? The answer is that, notwithstanding the unity of Dr. Ross's calling as a consultant radiologist, the allowances and deductions which he may make under the two Schedules differ. The rules for chargeability under Schedule D are now to be found in Part V of the Income Tax Act, 1952, beginning with section 122. By section 137 (*a*), the permissible deductions are, in effect, defined, so far as relevant, as sums wholly and exclusively expended for the purposes of the taxpayer's profession or vocation. Liability under Schedule E is expounded in Part VI of the Act, beginning at section 156. I shall not here recite the language of the two charging sections, which in material respects show a certain lack of conformity. But the disconformity is further exhibited by the circumstance that, for the appropriate allowances under Schedule E, it is necessary to turn to the Ninth Schedule to the Act, paragraph 7 of which reads as follows: "If "the holder of an office or employment of profit is necessarily "obliged to incur and defray out of the emoluments thereof the "expenses of travelling in the performance of the duties of "the office or employment, or of keeping and maintaining a horse "to enable him to perform the same, or otherwise to expend "money wholly, exclusively and necessarily in the performance "of the said duties, there may be deducted from the emolu-"ments to be assessed the expenses so necessarily incurred and "defrayed."

To the reader in the present age (which is sometimes described as that of the internal-combustion engine), the reference to the horse will be somewhat startling. Its presence is evidence of the long ancestry of the paragraph, re-enacted in succeeding consolidating statutes; for it reflects the fact, interesting, if hardly relevant today, that the means and speed of conveyance of an inhabitant of this island from one place to another depended in Napoleon's days, as it had depended in the days of Julius Caesar, upon the performance of the horse. More important, however, for present purposes is that the standard of permissible deductions under Schedule E is that of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the taxpayer's office or employment. Thus, the standard is in two respects stricter than that appropriate to the taxpayer assessed under Schedule D; for (1) not only must the expenses be wholly and exclusively but they must also be necessarily incurred, and (2) they must be incurred not merely for the purposes of the taxpayer's office or employment but, according to the language, actually in the performance of the duties of it.

When Schedule E was first devised it was limited in its application to the holders of certain public offices tabulated in paragraph 5 of the Schedule. It may well be that the stricter standard of allowances was appropriate and sensible in the case of the holders of such offices, whether equestrian or otherwise, starting with the holders of offices belonging to either House of Parliament; and it may also be that 150 years ago the class of Schedule D taxpayers was far smaller than it is today. But in 1922 there was transferred from the embrace of Schedule D to that of Schedule E a large class of taxpayers covered by the language of what is now the proviso to section 122 (1) of the Act of 1952 and reflected in section 156, paragraph 2. It is, of course, altogether beyond the scope of this judgment to attempt to define the limits of the transferred class. For my present purposes it is sufficient to observe that it covers the large class of taxpayers who receive their remuneration, after deduction of tax, under what is called the P.A.Y.E. system. I hope, therefore, I am not exceeding my judicial duty if I venture to suggest (probably not for the first time) that Parliament might well consider the justification and sense, at the present day, of the considerable distinction between the two Schedules in the matter of deductions and allowances. And added force is lent (as I hope) to my inquiry by the circumstances of the present cases. If the Crown is right (as, for reasons later appearing, I think it is) upon the first question already posed, then it follows that persons in the position of Dr. Ross must for the purposes of taxation have one essential part or function of their single calling severed from the rest, and must likewise, if the Crown is right upon the second question which the answer to the first involves, have each item of their expenses similarly dissected and then apply (as I think somewhat artificially) a different standard of justification to each dissected part.

An example or two from Dr. Ross's revenue account, exhibited to the case stated, will illustrate the point. In this account, the first item on the debit side is the salary (£2 per week) paid to

Dr. Ross's secretary. Another item is that of expenses in respect of his motor-car. It was not suggested that either of these two items would have been disallowed, as not having been wholly and exclusively expended for the purposes of Dr. Ross's profession, if he were taxable in respect of all his earnings under Schedule D. But, on the basis of his taxability in respect of his hospital appointment under Schedule E, it was said that some proportion of these items must be regarded as attributable to this appointment, and, as such, would then be likely to be disallowed, as either not necessarily incurred or as not incurred in the (actual) performance of his hospital duties.

The difficulty of such analysis is enhanced when it is borne in mind that Dr. Ross might well proceed on occasion from his consulting room to the hospital to attend both upon private patients and upon patients under his charge in pursuance of his duties under his hospital appointment—in both cases according to arrangements made by his secretary. Whether or not it was ever contemplated, when the conditions of the two Schedules were devised, that a taxpayer practising a single calling would be taxable for part of his single activity under one Schedule and for part under another, it is obvious that, if the Crown be right upon both questions, the process of severing expenses wholly and exclusively incurred for the purposes of that activity and applying different tests of justification to the severed parts are not only, as I have thought, artificial, but also highly formidable. There is, I venture to think, an unreality and absence of common sense in the processes which has encouraged me to suggest that consideration should now be given to the incidence and characteristics of the two Schedules; and, not the less so, since it must be in the public interest that the incidence of taxation should generally be regarded as sensible and just. We were informed that the result of the present cases would affect some 4,700 other medical practitioners, and it has seemed to me likely enough that men of other professions will be similarly affected.

For reasons later appearing, however, I think with my brethren that the appellants succeed upon the second main question raised; that is, that, although they must be taxed in respect of their hospital appointments under Schedule E, nevertheless they may still bring into account by way of deduction in their Schedule D assessments sums shown to have been wholly and exclusively expended for the purposes of their single professions as consultants, even though referable to their hospital work, and even though not allowable in their Schedule E assessments. The result may be logically unsatisfactory, but, as later appears, is one from which the language of section 137 (*a*) of the Act (which remained unaltered in spite of the transfer from Schedule D to Schedule E brought about in 1922, and now enshrined in the proviso to section 122 (1)) leaves no escape in the circumstances of the present cases. Though, therefore, if our conclusion on this matter is right, the complex processes above referred to will in the present cases at any rate be futile, the processes will still, so far as I can see, have to be undertaken; nor will they necessarily be futile in other but similar cases to which the commissioners' findings would not be applicable. The futility and illogicality in the present cases provide, therefore, I venture to think, no argument against a review of the Schedules by Parliament.

I return, however, to the first question for our determination, and the answer to it must depend upon whether Dr. Ross's hospital appointment constitutes an office or employment within the terms of section 156, paragraph 2, of the Act of 1952. It was the view of the special commissioners that the question should be answered affirmatively but that, nevertheless, the doctor was not assessable in respect of the emoluments thereof under Schedule E. This conclusion they based on the premise of their finding (already quoted) that the appointments were mere incidents, and necessary incidents, of his profession as a consultant radiologist; founding themselves upon the authority of the cases of *Davies* v. *Braithwaite* [1] and *Household* v. *Grimshaw*.[2] Mr. Heyworth Talbot, for the appellants, did not attempt to support the reasoning of the special commissioners: nor could he, with all respect to them, do so. It is now well established—for example, in *Fry* v. *Salisbury House Estate Ltd.*[3] in the House of Lords—that the various Schedules must be treated as distinct codes, of which Schedule D is, as it were, residuary in nature, applicable, if at all, to cases not falling within any of the other Schedules. It follows, therefore, that if, as regards his hospital appointment, Dr. Ross held an office or had an employment within section 156, then, as regards the emoluments of that office or employment, he must be taxable under Schedule E.

But it was Mr. Heyworth Talbot's submission that, because Dr. Ross's engagement by the hospital board was a mere incident of his professional activity, therefore he should not be regarded as holding an office or employment at all; and Mr. Heyworth Talbot cited the case of *Davies* v. *Braithwaite*[4] to support that argument. The cited case related to the professional activities as an actress of Miss Lilian Braithwaite, and it was proved that, in the ordinary course of those activities, Miss Braithwaite entered into contracts of " employment " with theatre managers and other persons. In that case the Crown (be it observed) was contending for the applicability not of Schedule E but of Schedule D; and the Crown's contention succeeded on the ground, putting it briefly but sufficiently, that such contracts which did not involve in any true sense the relation of master and servant, were not in truth contracts of employment at all, or at least not " employments " within the purview of Schedule E.

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[1] [1931] 2 K.B. 628; 47 T.L.R. 479; 18 T.C. 198.

[2] [1953] 1 W.L.R. 710; [1953] 2 All E.R. 12; 34 T.C. 366.

[3] [1930] A.C. 432; 46 T.L.R. 336; 15 T.C. 266.

In my judgment, the case of *Davies* v. *Braithwaite*[4] is upon its facts far removed from the present case. I agree with Upjohn J. that the conclusion that Dr. Ross's engagement with the Birmingham Regional Hospital Board constituted an " office " within the section is inescapable; though I prefer to express no view (and we were not invited to do so by Mr. Wilberforce) whether it was or was not a " public " office.

The contract of engagement is headed " National Health Service Act, 1946," followed by the name and address of the Regional Board. It is in the form of a letter under the heading " Appointment of Consultant (Part-time) " addressed to Dr. Ross and signed by the secretary to the board, having attached to it a form of acceptance signed by Dr. Ross. " The duties attaching to " the appointment " were expressed to be such as might be assigned by the Regional Board for the purpose of providing hospital and specialist services under section 3 of the National Health Service Act, 1946, at the hospitals indicated—though, as the judge pointed out, it naturally followed from the nature of Dr. Ross's professional status as a specialist that he was not placed under any direction as to how he would carry out his treatment of patients. The letter stated the number of hours Dr. Ross was expected to work. It contained certain provisions in regard to his place of residence if more than a certain distance from the hospitals where he was required to serve; it required Dr. Ross to notify the board in regard to his taking of " leave "; it provided that the appointment carried the right to a pension. There was no statement of the period of service, but it is not in

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[4] [1931] 2 K.B. 628.

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doubt that there was a fixed retiring age, and that the appointment was only terminable by Dr. Ross on reasonable notice to the board. The form of acceptance signed by Dr. Ross was in the following terms: "I hereby accept the appointment and the terms "and conditions of service described above." It is convenient here to add that Dr. Ross also signed on the same document an agreement "in addition to the above named duties" to undertake domiciliary consultation in accordance with the terms and conditions stated in a document issued in 1949 by the Ministry of Health.

In my judgment, the document which I have recited and which constituted the contract between the Birmingham Regional Board and Dr. Ross makes clear, upon the face of it, that Dr. Ross's appointment thereunder as a part-time consultant was, according to the ordinary understanding of its language and effect, an appointment to an "office," to what the commissioners referred to as a "post." Nor does the matter end there. The appointment was made by the Regional Board under the powers delegated to them under the Act by the Minister whose duty it was, by section 3 (1) (*c*), to provide the services of specialists at hospitals. By section 14 (1) of the Act it is provided (inter alia) that part-time specialists, appointed, as Dr. Ross was appointed, should be "officers" of the relevant Regional Boards; and the regulations made under that section likewise (and, as I think, naturally) refer to such specialists as "officers" (see Statutory Instrument 1948, No. 1416, paragraph 3).

The words "office" and "employment" as used in sections 122 and 156 of the Income Tax Act, 1952, have been the subject of judicial consideration. Thus, in the case of the *Great Western Railway Co.* v. *Bater*[5] (the decision in which by the House of Lords was the occasion for the transfer from Schedule D to Schedule E in 1922) Rowlatt J.[6] used the language "an office or "employment which was a subsisting 'permanent' substantive "position which had an existence independent of the person who "filled it, which went on and was filled in succession by succes- "sive holders"; language which was accepted as generally sufficient by Lord Atkin and Lord Wright, in *McMillan* v. *Guest.*[7] Lord Wright, in the latter case, also referred[8] to the New English Dictionary meaning of "office" as: "a position or place "to which certain duties are attached, especially one of a more or

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[5] [1922] 2 A.C. 1; 38 T.L.R. 48; 8 T.C. 231; [1920] 3 K.B. 246.

[6] [1920] 3 K.B. 266, 274.

[7] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.

[8] [1942] A.C. 561, 566.

"less public character." In my judgment, Dr. Ross's appointment clearly satisfied the tests indicated by these citations, and I have, therefore, for myself, no doubt upon authority and common sense that it was an "office" within the meaning of the relevant section of the Income Tax Act.

It will be convenient to deal here with two subsidiary points. First, I have equally no doubt that the domiciliary consultations which Dr. Ross undertook to do formed part of the duties of his "office." Domiciliary consultations (as the words imply) involve calls by the specialist at the homes of National Health patients; and the specialist making them is entitled from public funds to receive a fee of so much per visit, subject to a maximum. Dr. Ross was not bound to undertake this duty as an essential part of the hospital appointment, but in fact he agreed to do so. The obligation to make the visits was therefore a part of the duties of his "office."

The question of undertaking the duties of a locum tenens during the temporary absence of a part-time consultant is perhaps more difficult. (The question arises, in fact, in relation to another of the appellants than Dr. Ross.) I agree, however, with Upjohn J. that the duties involved are also those of an "office." The arrangements made were no doubt somewhat informal; but, as appears from the document of 1949 issued by the Ministry of Health, the engagement of a locum is made by the Regional Board. In my judgment, therefore, the duties owed to the board are essentially in pari materia with those of an appointment of a consultant: they are the duties of an "office."

I turn now to the second main question involved, which I formulate thus: Are the sums which Dr. Ross may deduct for the purposes of his Schedule D assessment limited to sums wholly and exclusively expended by him for the purpose of his private practice, or may he deduct all expenses so incurred for the purposes of his single calling of a consultant radiologist, even though such expenditure related to his hospital appointment and could not be allowed for the purposes of his Schedule E assessment in respect thereof? I have earlier anticipated my answer to this question, and I have upon it had the advantage of reading in advance the judgments to be delivered by my brethren. With those judgments and with their reasoning I am in entire accord. I confine myself therefore to a brief statement of my conclusion, which I only add out of respect for the view of the judge, from which, upon this matter, we are differing.

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1960

MITCHELL AND EDON v. ROSS.

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The relevant terms of sections 122 and 156 are set out in the judgment of Pearce L.J., and I do not repeat them, noting only that they do not entirely correspond. The question turns upon the meaning in its present context of the language of section 137 (*a*), which is: "Subject to the provisions of this Act, in computing the amount of the profits or gains to be charged under "Case I or Case II of Schedule D, no sum shall be deducted in "respect of—(*a*) any disbursements or expenses, not being money "wholly and exclusively laid out or expended for the purposes of "the trade, profession or vocation." It was, and was necessarily, of the essence of the argument of the Crown that, having regard to the present context of the paragraph, the word "profession" must be limited so as to be confined to that "profession" or part of the profession the profits or gains arising from which are taxable under Schedule D. In my judgment, the language of the paragraph is too clear and unambiguous to admit of such a limitation in a case, such as the present, where, according to the findings of the commissioners, the taxpayer's calling or "job in "life"—that is, his "profession"—is the single profession of a consultant radiologist. If that is in truth his profession, as has been found and as we must, in my view, clearly hold, then sums in fact wholly and exclusively expended for the purposes of that profession are deductible in his Schedule D assessment, and nonetheless so because they may have been attributable to his hospital appointment and cannot, wholly or partly, be allowed in the assessment of the emoluments of that appointment under Schedule E. If it had been intended to make clear that the terms of paragraph (*a*) of section 137 were limited as the Crown suggests, it would have been easy so to express the paragraph. Its terms, however, appear to have remained and been re-enacted without alteration after the passing of section 18 of the Finance Act, 1922, and, notwithstanding the insertion of the proviso to section 122 (1), in the consolidating Act of 1952. In my judgment, the words mean what they appear to me clearly to say. The Crown's argument requires that some gloss should be added to the statutory language, and I do not see any justification for making it.

The result is that the appeal must be allowed. We will discuss the form of order appropriate to be made when my brethren have delivered their judgments.

PEARCE L.J. I agree. It is clear that the hospital appointment is an office. But the taxpayer contends that, even though it be an office, he is entitled to include its expenses among the other expenses of his profession deductible under Schedule D. The commissioners have found that at all material times Dr. Ross exercised the profession of consultant radiologist, his part-time hospital appointment being a necessary part of the exercise of that profession by him and merely incidental thereto, notwithstanding that a great deal of his time was thereby taken up. These are findings of fact, and have not been challenged.

One would think, therefore, at first sight, that expenses wholly and exclusively expended for the purposes of his hospital appointment should be regarded as wholly and exclusively expended for the purpose of his profession. The Crown argue that they cannot be so regarded for the following reason: section 122 of the Income Tax Act, 1952 (which is Schedule D), provides that tax under that Schedule shall be charged in respect of the annual gains arising or accruing to any person residing in the United Kingdom from any trade, profession or vocation. Dr. Ross's professional profits therefore fall to be taxed under Schedule D. But the proviso to Schedule D says that profits or gains arising or accruing to any person from an office shall not by virtue of that paragraph be chargeable to tax under Schedule D except in certain circumstances which are inapplicable. Section 156 of the Act (which is Schedule E) provides in paragraph 2: "Tax under this Schedule "shall also be charged in respect of any office . . . the profits or "gains arising or accruing from which would be chargeable to tax "under Schedule D but for the proviso to paragraph 1 of that "Schedule."

The hospital appointment therefore must be taxed as an office under Schedule E, and any expenses of it can, it is said, only be deducted under Schedule E. In respect of an office there can only be deducted under Schedule E (Ninth Schedule, paragraph 7) money wholly and exclusively and necessarily expended in the performance of the duties, whereas in respect of a profession there can be deducted under Schedule D (section 137) disbursements or expenses wholly and exclusively laid out or expended for the purposes of the profession. The Crown therefore seek to disallow certain expenses of the hospital appointment, which are not within the narrower limit imposed by Schedule E, although they are within the broader limit imposed by Schedule D.

The Income Tax Act, it is argued, is divided into self-contained Schedules, and one cannot set against the Schedule D profits of a profession any expenses attributable to a part of that profession that has been caught by Schedule E. It would, it is said, be absurd and disruptive of the present methods of taxation to allow the taxpayer to recover, as part of the Schedule D expenses attributable to his profession, expenses which are attributable to the hospital appointment taxed under Schedule E, but which are not allowable under Schedule E. I do not see any absurdity in such a situation. In the infrequent cases where an office is found to be a necessary part of the exercise of a profession and to be merely incidental to it, I see nothing absurd in treating the expenses of the office as part of the expenses of the profession. Nor do I think it will cause a general disruption of the present method. It is more reasonable than notionally dividing in half a profession, which has been found to be one entity, producing an artificial allocation of expenses between the two halves, and then allowing the expenses of one-half and disallowing those of the other.

The argument of the Crown, therefore, can derive no aid from any argument based on merits. It must stand or fall on the wording of the Act. Lord Simonds observed in *St. Aubyn* v. *Attorney-General*[9]: "The question is not at what transaction the "section is, according to some alleged general purpose, aimed but "what transaction its language, according to its natural meaning, "fairly and squarely hits."

Only two cases are relevant. The *Salisbury House* case[10] decided that rents were profits arising to a company from the ownership of land, and that the Schedule A assessment was exhaustive in respect of them, so that they could not be included in an assessment under Schedule D as trade receipts of the company. Lord Atkin there said[11]: "Believing as I do that "the specific Schedules A, B, C and E and the rules thereunder "contain definite codes applying exclusively to their respective "defined subject-matters, I find no ground for assessing the tax-"payer under Schedule D for any property or gains which are "the subject-matter of the other specific Schedules. In the "present case the income from the offices should be and has been "assessed under Schedule A on the annual value as prescribed by "statute. It therefore is not the subject-matter of assessment "under D." That case is relied on by the Crown as showing that once the hospital appointments have been excised from the profession and put into Schedule E, that part of the profession which is left in Schedule D cannot have any regard to the hospital appointment or claim any of its expenses.

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[9] [1952] A.C. 15, 32; [1951] 2 All E.R. 473.

[10] [1930] A.C. 432.

[11] Ibid. 457.

But in so far as any inferences favourable to the Crown can be drawn from dicta in the *Salisbury House* case,[12] they are negatived by what was said in *Hughes* v. *Bank of New Zealand*,[13] decided seven years later by the House of Lords. In that case the bank made substantial profits in dealing with Government securities which came within Schedule C, and which by their terms of issue were exempted from taxation. It was held that those profits, since they were exempt from taxation and came within Schedule C, were not to be included in the trading profits under Schedule D, but that the expenses attributable to them could be included in the general trading expenses under Schedule D and deducted from the profits under Schedule D. It was there said by Lord Wright M.R.[14]: "The result seems to be that the "legislature in the Income Tax Acts has expressly provided for "certain exemptions and exclusions which will operate when the "profits of the trade are being dealt with under Case I of "Schedule D, and has, either inadvertently or by design, omitted "to make any corresponding provision in respect of any allocation "or apportionment of the expenses of the trade."

In the House of Lords, Lord Thankerton said[15]: "It is "perhaps enough to say that the Crown are unable to point to any "statutory provision in support of their contention, whereas the "respondents find full justification for their resistance in the pro-"visions of rule 3 of the Rules applicable to Cases I and II of "Schedule D, which is as follows: '3. In computing the amount "'of the profits or gains to be charged, no sum shall be deducted "'in respect of—(*a*) any disbursements or expenses, not being "'money wholly and exclusively laid out or expended for the "'purposes of the trade, profession, employment, or vocation.' "In order to ascertain the authorised deductions it is right to "turn this into positive form. In this view, it seems to me to be "incontrovertible that, in the present case, the investments in "question were part of the business of the respondents' trade, "and that the expense connected with them was wholly or "exclusively laid out for the purposes of the trade. Expenditure "in course of the trade which is unremunerative is none the less a "proper deduction, if wholly and exclusively made for the pur-"poses of the trade. It does not require the presence of a receipt "on the credit side to justify the deduction of an expense."

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[12] [1930] A.C. 432.

[13] [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778; 21 T.C. 472.

[14] [1937] 1 K.B. 419, 450.

[15] [1938] A.C. 366, 378.

It is clear from that case that there is no absolute rule that when part of the profits under Schedule D are transferred to another Schedule (in that case Schedule C) the expenses attributable to the part transferred cannot remain to be dealt with under Schedule D. It is true that Schedule C had no provision for deduction of expenses: but that does not, to my mind, affect the principle. I find no authority for reading into the Act a rule that where part of the profits under Schedule D are transferred to another Schedule, then if (and only if) that other Schedule has a provision for deductions, the expenses attributable to the part transferred cannot be dealt with under Schedule D. In this case, therefore, there is no constraint by authority or reason or manifest general intention to do other than follow the literal wording of the Act.

It is clear that this particular problem was not in the mind of the draftsman of the relevant sections. No doubt it never occurred to him that a taxpayer carrying on the profession of a consultant radiologist, whose hospital appointment was a necessary part of his profession and was, in fact, inextricably mixed up with it, would be divided by theoretical binary fission into two halves having unequal rights to expenses laid out in the exercise of that profession. If it did occur to him, he was not very fortunate in his choice of words.

Section 137 (*a*) reads as follows: "Subject to the provisions "of this Act, in computing the amount of the profits or gains to "be charged under Case I or Case II of Schedule D, no sum "shall be deducted in respect of—(*a*) any disbursements or "expenses, not being money wholly and exclusively laid out or "expended for the purposes of the trade, profession or vocation." In neither that nor the following subsections (in six of which the words " trade, profession or vocation " occur) is there any suggestion that the trade, profession or vocation referred to might not be the actual physical trade, profession or vocation, but might be the metaphysical residue of that trade, profession or vocation after it has been notionally denuded of some part that has been taken over by some other Schedule.

It is argued by the Crown that the words " in computing the "amount of the profits or gains to be charged under Case I or "Case II of Schedule D no sum shall be deducted," and so forth, show that the deductions must be only those which are referable to the profits and gains to be charged under Schedule D. But although, in general, you only expect expenses referable to the gains and profits that they produce, it is not always so. Many things that produce no gross profit are proper expenses of a business, things that have been intended to help the business, and may have done so. As Lord Thankerton said, above: "It does "not require the presence of a receipt on the credit side to justify "the deduction of an expense."

The test laid down in section 137 is whether the expenses have been wholly or exclusively laid out or expended for the purposes of such trade, profession or vocation. Here, the sums in question have been laid out or expended for the purposes of Dr. Ross's profession, as found by the commissioners. If it had been desired to exclude the expenses of a part of the profession transferred to Schedule E, it would have been easy to say so. I decline to read that gloss into the plain words of section 137 (*a*), or to import into this consolidation Act implications which could have been easily and clearly expressed.

The Crown argument seems to me to be covered by the words of Lawrence J. in *Hughes* v. *Bank of New Zealand*[16]: "I am of "opinion that there is no ground for excluding those expenses "merely because some part of the profits which those expenses "had been incurred to earn is exempt from income tax. The "contention of the Crown is based upon reading rule 3 applicable "to Cases I and II as though it read, 'any disbursements or "'expenses, not being money wholly and exclusively laid out or "'expended for the purpose of earning profits brought into "'charge,' but that is not what the rule says, and again the "words of the rule must be strictly adhered to. The expenses "may be laid out for the purposes of trade, and undoubtedly were "apparently in this case laid out for the purposes of the trade, "although they earned profits which, by reason of exemption, are "not brought into charge."

There is no hardship or unfairness in such a refusal to read into the Act dubious implications that could easily have been expressed: for the Crown are always in a favourable position to clarify any matter by amendment, and to put their rights against the taxpayer beyond any doubt.

For these reasons I would allow the appeal.

HARMAN L.J. Two questions arise here. First, whether the activities of the doctor under the National Health Act, 1946, constituted the holding of an office of profit within the meaning of

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[16] 21 T.C. 472, 486.

Schedule E of section 156, paragraphs 1 or 2 of the Income Tax Act, 1952, or whether these activities were merely one of the engagements entered into by the doctor in the course of the practice of his profession. This is not a matter patient of much discussion. The commissioners and the judge below agreed that this is an office, and I too agree. These activities cannot, in my judgment, properly be described as merely engagements, as were the various activities of an actress in the course of the exercise of her profession as an actress, illustrated in the *Braithwaite* case.[17] The appointment of a consulting radiologist by the agent of the Minister of Health in pursuance of his duty of maintaining a national health service (see National Health Service Act, 1946, s. 12 (1)) is plainly, in my judgment, the constitution of an office and the appointment of an officer to hold it. An office is a position or post which goes on without regard to the identity of the holder of it from time to time, as was said, in effect, by Rowlatt J. in the *Great Western Railway Co.* v. *Bater*,[18] and approved by Lord Atkin in *McMillan* v. *Guest*.[19] Coming to this conclusion, I need not consider whether this is not also an employment within Schedule E, nor whether the office is a public one. I should incline to answer both these questions in the affirmative if necessary.

It seems to me to follow inevitably—and, though the commissioners thought otherwise, it was accepted by the judge, and not contested here—that the emoluments of the office come into charge to tax under Schedule E. So also, in my judgment, do the doctor's activities in the sphere of domiciliary visits to patients by arrangement with general practitioners in the area covered by the office. These seem to me on the facts stated to be perquisites of the office. It is true that they arise out of a separate agreement, and that the doctor need not assume the obligation to make such visits, even though he holds the office, but the opportunity to make the contract is offered to him as being the consultant radiologist in the area, and profits from it are, it seems to me, perquisites of the office.

The second point was not, as I understand it, discussed at great length before the judge, who dealt with it in one sentence,[20] concluding in accordance with the decision in the *Salisbury House* case [21] that the Schedules were exclusive and that, therefore, the expenses incurred by the doctor must be divided and attributed in part to one set of activities—namely, the treatment of private patients—and in part to the other—the performance of the duties of his office. This, in my judgment, brushes aside with too little attention the special feature of this case—namely, the finding by the commissioners first in these words in paragraph 7 (2) of the case stated: " His private practice which he commenced on " 1st March, 1950, was carried on at an address in Rugby which " was also his home, and as a necessary part of the exercise of " that profession he had accepted and still held part-time appoint-" ments as consultant radiologist to each of several hospitals "; and this conclusion at the end of paragraph 7 (4): " We also find " that at all material times Dr. Ross exercised the profession of " consultant radiologist, his part-time hospital appointments being " a necessary part of the exercise of that profession and merely " incidental thereto, notwithstanding that a great deal of his time " was thereby taken up."

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[17] [1931] 2 K.B. 628.

[18] [1920] 3 K.B. 266, 274.

[19] [1942] A.C. 561; [1942] 1 All E.R. 606; 24 T.C. 190.

[20] Ante, pp. 145, 167; [1959] 3 W.L.R. 550, 567.

[21] [1930] A.C. 432.

I do not think these are conclusions of fact so as to be binding on the court, but they are, in my judgment, conclusions of mixed fact and law dependent on the testimony of witnesses whom the commissioners heard and we have not, nor have we any note of it, and I do not think that these conclusions can possibly be disregarded. It follows that the doctor did not carry on two professions, nor engage in two sets of activities, but one. Whether he was attending his National Health patients or his paying patients, he was following the same vocation, the practice of a radiologist. It is true that in order to succeed in this profession he found himself, professionally speaking, obliged to serve part-time as an officer of the National Health Service. We have concluded that he thus brought himself within Schedule E.

Now this is an historical accident. Until 1922 tax was levied under Schedule D on the annual profits accruing to any person residing in the United Kingdom from any trade, profession, employment or vocation (see Income Tax Act, 1918, Sch. D (1) (A) (ii)). Under Schedule E were taxed " every public office or " employment of profit " (see Income Tax Act, 1918, Sch. E). Under this latter Schedule, the tax was paid by deduction and it was used, because it was convenient, for many cases which did not fall within the Schedule at all. The House of Lords, in the case of the *Great Western Railway Co.* v. *Bater*,[22] pointed this out. Bater was a ticket clerk on the Great Western Railway, certainly not holding a public office, nor indeed an office at all. One of their Lordships remarked that he did not hold an office but merely sat in one. This decision was an administrative inconvenience, and the law was altered by the Finance Act, 1922, s. 18, whereby profits accruing from an office or employment under the Act of 1918 chargeable under Schedule D ceased to be chargeable under that Schedule and were made chargeable under Schedule E; and the section adds these words: "the rules applicable to that "Schedule shall apply accordingly."

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[22] [1922] 2 A.C. 1.

Now it is notorious—and is, indeed, a long-standing injustice—that the scale of the taxpayer's allowances under Schedule E are on an altogether more niggardly and restricted scale than under Schedule D. Indeed, it has been said that the pleasures of life depend nowadays upon the Schedule under which a man lives. When you turn to the Act of 1952, you will accordingly find in section 122 included under Schedule D profits arising from any profession, employment or vocation, with the proviso that profits accruing from an office or employment shall not be chargeable under the Schedule (with exceptions here immaterial). Section 137, as inverted in accordance with the true interpretation of it, allows the deduction of disbursements or expenses wholly and exclusively laid out for the purposes of the trade, profession or vocation. Under section 156, Schedule E is to include (ii) tax in respect of any office or employment the profit accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule. For the expenses which may be deducted under this Schedule one must turn to Schedule 9 of the Act of 1952, paragraph 7, which limits the deductions to expenses incurred: (a) in travelling, (b) in keeping a horse, or (c) any expenses wholly, exclusively and necessarily laid out in the performance of the duties of the office.

It is the object of the Crown, therefore, to split the doctor in two and to treat him as if he was in the enjoyment of two sorts of profit, one arising under Schedule D and one under Schedule E, to oblige him to make two returns, and to attribute to each activity the expenses exclusively incurred in the course of it. The result will be that such of the expenses as fall under a Schedule E activity will be disallowed unless they are necessary, whereas of the expenses attributed to the Schedule D activity expenses in fact incurred "for the purposes of the profession" may be deducted. This, as it seems to me, is a conclusion contrary to common sense and to the facts. As I have earlier said, the doctor must be taken to have been carrying on one profession of which the services to the National Health Scheme are part. I do not think he has two sources of profit. All his income is the result of the practice of his profession. There must be many occasions when it cannot be said which activity is being pursued, and when the proposed division of activities cannot be made except on a purely arbitrary basis. Many absurd results follow. For instance, a general practitioner is taxed under Schedule D, notwithstanding the fact that he has entered into a contract with the agent of the Minister, here the Executive Council. When he calls in a consultant, both will attend the patient, but the expenses attendant on each will rank under different Schedules though both are doing the same work.

In my judgment, Dr. Ross's accounts in this case can properly be made up only by setting all the professional remuneration on one side and all the expenses incurred "for the purpose of the "profession" on the other. Having done this, the proviso to section 122 obliges you to take out of the account the profits or gains accruing from the office. In my judgment you must, when transferring these to Schedule E, make such deductions as that Schedule allows. You will then have the taxable sum under Schedule E. To ascertain the taxable sum under Schedule D, you will deduct from the professional receipts which remain the expenses incurred for the purpose of the whole profession after deducting such (if any there be) as have already been allowed against the Schedule E total as having been necessarily expended on a horse or what-not. This seems to me to be the best that can be done. It is said that this does violence to the policy of the Act, because only expenses appropriate to the Schedule D activity should be deducted from the Schedule D profits. I agree that this would be what one might expect to find, but I cannot find it stated in the Act.

The judge considered that the *Salisbury House* case[23] obliged him to treat the two schedules as mutually exclusive, but it has been pointed out to us that this is not by any means always so, notably in the *Bank of New Zealand* case,[24] where profits which would have been chargeable under Schedule C were excluded because they were exempt from tax and so taken out of the credit side of the account, but expenses incurred in the making of those profits were nevertheless held properly to remain on the debit side. Lord Thankerton forcibly pointed out that an expense was nevertheless a proper charge although profits did not accrue from it. This seems to me a good analogy for the method of assessing the tax here which I have above proposed.

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[23] [1930] A.C. 432.

[24] [1938] A.C. 366.

I add that this result will only follow in the special and peculiar situation resulting from what I have called the special findings of the commissioners—namely, that only one profession is being followed, and that the office is held merely as an incident of it, and because without it the whole profession cannot in practice be carried on. I would therefore allow the appeal.

Appeal allowed.
The taxpayers to have two-thirds of their costs.
Leave to appeal to the House of Lords.

Solicitors: *Hempsons; Solicitor of Inland Revenue.*

B. A. B.

1960
March 16, 17;
April 6.

Cross J.

CHILD'S TRUSTEE CO. *v.* INLAND REVENUE COMMISSIONERS.

[1960 C. 176.]

Revenue—Estate duty—Property passing on death—Insurance policy—Life interest in policy beginning only on death of life assured—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*) (*d*), 3 (1) (2).

Revenue — Estate duty — Gift inter vivos — Consideration — Family arrangement—Deceased retaining no interest—Beneficiary forgoing rights against other beneficiaries—Whether policies "provided" by deceased—Evidence of consideration—Need to file—Finance Act, 1894, *s.* 2 (1) (*d*).

Before the execution of a disentailing deed and resettlement on April 30, 1940, lands, investments and capital moneys were held on trust for a father for life with remainder to his son in tail, subject to incumbrances on the fee simple, to 13 charges on the father's life interest secured by insurance policies on his life, to family charges and to two terminable rentcharges. Father and son agreed that £25,528 be raised out of capital and used to pay off 11 of the 13 charges; that a further £1,222 (making £26,750 in all) be so raised and paid to the father; that the rentcharges be extinguished and the father released from liability for them; that two of the policies which would revest in the father on the discharge of the charges on his life interest be converted by him into fully-paid policies for £8,100 and brought into settlement; and that, subject to remaining incumbrances and charges, the lands and the balance of investments and capital moneys be resettled on the father for life, subject to an annuity to the son for life with power to the son to appoint an annuity to his widow for life should he die in the father's lifetime to continue for his children's benefit should his widow also die therein with remainder to the son, for life, with remainder over.

Pursuant to that agreement, sufficient proceeds of sale were set aside to provide the sums to be raised, the father converted the two policies into fully-paid policies, and on April 30, 1940, the son disentailed the lands and capital moneys and the father and son executed the resettlement. By the resettlement father and son appointed that the father thenceforth hold the settled lands subject as therein mentioned on trust that the son receive the annuity, and subject thereto for the father for life, and after his death for the son for life, with remainder in trust for the son's sons successively in tail male with remainders over. The balance of the investments and capital moneys was resettled and the two policies were brought into settlement, and the trustees were directed to hold the policies until the father's death, and thereon to collect the policy moneys and to hold them, subject to any appointment to the contrary, "upon the trusts and subject to the powers and provision upon and "subject to which capital moneys or investments representing the "same would be held."

On January 25, 1958, the father died, survived by the son. The Commissioners of Inland Revenue claimed duty on the policy moneys which then became payable, on the footing that they passed on the father's death under section 1 or section 2 (1) (*b*) of the Finance Act, 1894,[1] alternatively, under section 2 (1) (*d*), on the value of

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[1] Finance Act, 1894, s. 2: "(1) "Property passing on the death of "the deceased shall be deemed to "include the property following, that "is to say . . . (*b*) Property in which "the deceased or any other person "had an interest ceasing on the death "of the deceased, to the extent to "which a benefit accrues or arises by "the cesser of such interest; but "exclusive of property the interest in "which of the deceased or other person was only an interest as holder "of an office, or recipient of the "benefits of a charity, or as a corporation sole . . . (*d*) Any annuity "or other interest purchased or provided by the deceased, either by "himself alone or in concert or by "arrangement with any other person, "to the extent of the beneficial "interest accruing or arising by survivorship or otherwise on the death "of the deceased."

S. 3: "(1) Estate duty shall not "be payable in respect of property "passing on the death of the deceased "by reason only of a bona fide purchase from the person under whose "disposition the property passes, nor "in respect of the falling into possession of the reversion on any lease "for lives, nor in respect of the determination of any annuity for lives, "where such purchase was made, or "such lease or annuity granted, for "full consideration in money or "money's worth paid to the vendor "or grantor for his own use or benefit, or in the case of a lease for the

the son's life interest in them at the father's death. On a summons by the trustees to determine whether they were accountable by reason of the father's death for estate duty in respect of the policies or, alternatively, in respect of the moneys due thereunder, and if so, to determine the extent of their liability:—

Held, (1) that, on the true construction of the resettlement, the father was not given a life interest in the policies, and did not take any interest in them by way of resulting trust, since they were held from the first on trust for those beneficially interested after his death, and the son's life interest in the policy moneys began only after the father's death (post, p. 545).

Westminster Bank Ltd. v. *Inland Revenue Commissioners* and *Wrightson* v. *Inland Revenue Commissioners* [1958] A.C. 210; [1957] 2 All E.R. 745, H.L. distinguished.

(2) That, as the policies were retained and never yielded any income during the father's lifetime, on his death nothing passed from the other beneficiaries to the son; all that happened was that what had been the son's reversionary life interest in the policy moneys became a life interest in possession, and that the other beneficiaries' interests in them became expectant only on the son's death, and the claim to duty on the capital of the policy moneys under section 1 or section 2 (1) (*b*) failed (post, p. 547).

In re Hodson's Settlement [1939] Ch. 343; 55 T.L.R. 357; [1939] 1 All E.R. 196, C.A.; *Westminster Bank Ltd.* v. *Attorney-General* [1939] Ch. 610; [1939] 2 All E.R. 72, C.A. and *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347; [1953] 1 All E.R. 403, H.L. considered.

(3) That where, as in the present case, it was part of the arrangement between father and son that the father bring the policies into settlement for the benefit of others as well as the son, the father could fairly be said to have "provided" them within the meaning of section 2 (1) (*d*) for the beneficiaries by arrangement with the son, even though the father received under the arrangement full consideration for everything which he gave up, including the policies. Although the father retained no interest in the policies, the son did not obtain an absolute interest, and from the remaindermen's point of view, the father was one of the providers of the policies, even though he might have driven a hard bargain with the son in insisting that they be brought into settlement. Accordingly, the duty was payable on the value of the son's life interest in the policy moneys under section 2 (1) (*d*) (post, p. 552).

Attorney-General v. *Hawkins* [1901] 1 K.B. 285; 17 T.L.R. 85, D.C. applied.

"use or benefit of any person for "whom the grantor was a trustee.

"(2) Where any such purchase was "made, or lease or annuity granted, "for partial consideration in money "or money's worth paid to the vendor "or grantor for his own use or benefit, or in the case of a lease for the "use or benefit of any person for "whom the grantor was a trustee, the "value of the consideration shall be "allowed as a deduction from the "value of the property for the purpose "of estate duty."

Lethbridge v. *Attorney-General* [1907] A.C. 19; 23 T.L.R. 123, H.L. distinguished.

Per curiam. Where plaintiffs in a case of this sort claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they should file evidence with regard to the value of the consideration unless it is agreed with the commissioners (post, p. 552).

ADJOURNED SUMMONS.

On January 14, 1960, the plaintiffs, trustees of a resettlement dated April 30, 1940, made between Thomas Edmund Sotheron Estcourt ("Captain Estcourt") and his son, Thomas Desmond George Sotheron Estcourt ("Desmond") of the one part, and the plaintiffs of the other part, took out a summons asking whether they were accountable, by reason of the death on January 25, 1958, of Captain Estcourt, for estate duty in respect of policies of assurance on his life specified in the fifth schedule of the resettlement or either of them (or alternatively in respect of the moneys payable thereunder) and, if so, that the extent of their liability might, if and so far as necessary, be determined.

The following statement of the facts is taken from the judgment of Cross J.

Before the execution of a disentailing deed and a resettlement on April 30, 1940, certain lands, investments and capital moneys were held in trust for the late T. E. S. Estcourt ("Captain "Estcourt") for life, with remainder to his son, T. D. G. S. Estcourt ("Desmond") in tail, subject (a) to various incumbrances affecting the fee simple of the land; (b) to 13 charges on Captain Estcourt's life interest which were secured by policies of assurance on his life; (c) to certain family charges; and (d) to two small terminable rentcharges expiring in 1949 and 1951 created in favour of the inheritance under section 85 of the Settled Land Act, 1925. Captain Estcourt and Desmond, who could together dispose of the settled property as they liked subject to the incumbrances, entered into an arrangement of which the main terms were as follows: 1. A sum of £25,528 was to be raised out of the capital moneys and used to pay off 11 of the 13 charges on Captain Estcourt's life interest. 2. A further sum of £1,222 was to be raised out of capital and paid to Captain Estcourt. 3. The terminable rentcharges were to be extinguished, and Captain Estcourt released from his liability for outstanding instalments amounting to about £220. 4. Two of the policies on Captain Estcourt's life which would be revested in him on the discharge of

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the charges on his life interest were to be converted into fully-paid policies on his life for an aggregate sum of £8,100 and brought into settlement by him. 5. The lands and the balance of the investments and capital moneys were to be resettled in the usual way subject to the incumbrances on the fee simple of the lands and the existing family charges and the two remaining charges on Captain Estcourt's life interest, and also subject to an annuity of £500 per annum payable to Desmond for life, with power to him if he should die in his father's lifetime to appoint an annuity of £300 to his widow for life to continue if she too died in Captain Estcourt's lifetime for the benefit of his children.

In pursuance of this arrangement Desmond, on April 30, 1940, disentailed the lands and capital moneys with the consent of Captain Estcourt, and on the same day a resettlement was executed by them under the joint power reserved to themselves by the disentailing deed. The resettlement was made between Captain Estcourt and Desmond of the one part, and Child's Trustee Co. as trustees of the other part. After reciting the agreement which was described to be by way of family arrangement, and the fact that in pursuance of it the trustees had set aside proceeds of sale of certain investments sufficient to provide the sums to be raised out of capital, and that the two policies in question had been duly converted into fully-paid policies, Captain Estcourt and Desmond irrevocably appointed that the settled lands should thenceforth be held by Captain Estcourt subject to the incumbrances on the fee, the family charges and the two subsisting charges on his life interest, but discharged from the terminable rentcharges, upon such trusts as he and Desmond should by deed jointly appoint, and in default of appointment (either under that power or certain other joint powers arising only if Desmond should die in the lifetime of Captain Estcourt) upon trust that Desmond should receive a rentcharge of £500 during his life (with provision in case he should die in the lifetime of Captain Estcourt for the payment of the other agreed rentcharges for the benefit of his widow and children), and subject thereto in trust for Captain Estcourt during his life by way of restoration of his original life estate, and after his death in trust for Desmond during his life, with remainder in trust for Desmond's sons successively in tail male, with numerous remainders over. The resettlement gave the successive life-tenants the usual power to appoint rentcharges to their surviving wives and husbands and to charge the lands with portions for their younger children.

Clause 28, which resettled the balance of the investments and capital moneys, and under which the two policies of assurance were brought into settlement, was in the following terms:

"28.—(1) Captain Estcourt and the said Desmond Estcourt " in exercise of the power for this purpose given to them by the " deed of disentail and of all other powers enabling them and as " settlors hereby jointly and irrevocably appoint that all and " singular the investments and moneys mentioned in the first " schedule hereto shall henceforth so remain and be held upon " the trusts and with and subject to the powers hereinafter " declared concerning the same.

"(2) Captain Estcourt as settlor hereby assigns unto the " trustee all those policies of assurance effected in his own " name and on his own life mentioned in the fifth schedule hereto " and all moneys assured by or to become payable thereunder " to hold unto the trustee upon trust that the trustee shall " as soon as may be after the maturity of the said policies " respectively get in and receive the money to become payable " thereunder respectively and shall stand possessed of the net " residue thereof after discharging all costs and expenses of " recovering and receiving the same (hereinafter called 'the " 'policy moneys') upon the trusts and with and subject to " the powers hereinafter declared concerning the same.

"(3) The investments and moneys appointed by sub-clause (1) " of this clause and the policy moneys shall go and be held upon " such trusts and in such manner generally as Captain Estcourt " and the said Desmond Estcourt shall from time to time or at " any time by deed revocable or irrevocable jointly appoint and in " default of and subject to any such appointment and if the said " Desmond Estcourt shall die in the lifetime of Captain Estcourt " upon such trusts and in such manner generally as Captain " Estcourt and the person for the time being entitled to the first " interest for life in remainder under the limitations of the settled " land hereinbefore contained expectant on the death of Captain " Estcourt and the failure or determination of all intermediate " limitations in tail male or in tail or if such tenant for life in " remainder shall be under the age of twenty-one years Captain " Estcourt and the trustees shall from time to time or at any " time by deed revocable or irrevocable jointly appoint but so that " no appointment under the last mentioned power shall operate to " overreach the beneficial interests in the premises appointed of " the widow and children of the said Desmond Estcourt by "reference to the provisions of clauses 5, 6, 8, 18 and 19 hereof. "And in default of and until and subject to any appointment "under the powers aforesaid or either of them upon the trusts "and subject to the powers and provisions upon and subject to "which capital money or investments representing the same "would be held."

Captain Estcourt died on January 25, 1958, leaving Desmond him surviving, and on his death the Commissioners of Inland Revenue claimed estate duty on the policy moneys totalling £8,100 which then became payable on the footing that they passed on Captain Estcourt's death under section 1 or section 2 (1) (*b*) of the Finance Act, 1894, or alternatively, estate duty under section 2 (1) (*d*) on the value of Desmond's life interest therein at Captain Estcourt's death. This summons was taken out by Child's Trustee Co. as trustees of the resettlement against the Commissioners of Inland Revenue to determine whether either of these claims is justified. The plaintiffs have argued first that the policy moneys would not have been liable to duty under either head of charge even if the settlement of them had been a voluntary settlement by Captain Estcourt, and, alternatively, that if the policy moneys are, prima facie, within either head of charge, the fact that the settlement of them was the outcome of a bargain between Captain Estcourt and Desmond for which Captain Estcourt received full consideration frees them from any charge to duty.

E. I. Goulding for the plaintiffs. Questions like this must depend very largely on the precise framing of the resettlement. The following six points are raised on behalf of the plaintiffs. First, neither Captain Estcourt nor any other person had an interest in the policies or policy moneys ceasing on Captain Estcourt's death. Secondly, neither the policies nor the policy moneys changed hands or suffered a change of title or enjoyment on his death. Thirdly, there was, therefore, no "passing" under section 1 or section 2 (1) (*b*) of the Act, or under those two provisions in combination. Fourthly, neither the policies nor the policy moneys were "purchased or provided" by Captain Estcourt within the meaning of section 2 (1) (*d*), but solely by Desmond. Fifthly, alternatively, no "beneficial interest" within section 2 (1) (*d*) accrued or arose in the policies or policy moneys on Captain Estcourt's death. Sixthly, in any case the policies and policy moneys are exempted by section 3 of the Act from duty under section 1 or section 2.

Taking together the first three propositions, which leave out of account the limited claim under section 2 (1) (*d*), those three propositions are directed to the way in which the claim was first put forward, i.e., here is a settled estate consisting of various items, one of which is this policy and, as Captain Estcourt had an interest in the estate, he had one in each item. To reveal whatever force there is in that argument, what happened on Captain Estcourt's death must be closely examined, namely, that the policy moneys became payable by the life office and that the joint power of appointment in them ceased to exist. Neither the joint powers of appointment nor the referential trusts relating to the capital moneys are imposed on the policies, but on the policy moneys at maturity. Only at that point are there any beneficial trusts or powers declared in relation to the policies. This is not a case where the life tenant might have received income from a surrender of the policies. Captain Estcourt and Desmond could not have created a power of sale in exercise of their power of appointment without more: they could not simply appoint that the trustees should have a power of sale, because their power of appointment was over the policies, not over the policy moneys. Had Desmond's son, on attaining 21 during Captain Estcourt's life, disentailed, he and Desmond could have disposed as they thought fit of the policies during Captain Estcourt's life.

Propositions 4 and 6 above are closely allied and are treated as alternative in one of the early cases in the House of Lords. With the contention that Captain Estcourt had not a life interest, it is submitted that *Wrightson* v. *Inland Revenue Commissioners* [2] establishes that part of the plaintiffs' case depending on proposition 5 above. The earliest case, *Attorney-General* v. *Robinson*,[3] is not all good law now: nonetheless, any consideration of a case of this type must start with it. The decision in it is explained in *Richardson* v. *Inland Revenue Commissioners*.[4] Also, in *Attorney-General* v. *Hawkins* [5] there is no suggestion that the life tenant could not get a benefit from the policies during his life. That case, so far as it goes, does not turn on the fact that the son did not get the policies absolutely. During the father's life any policy moneys that arose would at once come into the general settlement for the benefit of the father during his life. Hence the arrangement was one by which both parties benefited. *Lethbridge*

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[2] [1958] A.C. 210; [1957] 2 All E.R. 745.

[3] [1901] 2 I.R. 67.

[4] [1909] 2 I.R. 597.

[5] [1901] 2 K.B. 285; 17 T.L.R. 285, D.C.

v. *Attorney-General* [6] turned on section 2 (1) (*d*), and it was held that as the son had made an absolute purchase of the policy moneys for valuable consideration, the father had not provided them. [Reference was also made to *Attorney-General* v. *Sandwich (Earl)* [7]; *In re Bateman* [8]; *Adamson* v. *Attorney-General* [9]; *In re Hodson's Settlement.* [10]] In *Westminster Bank Ltd.* v. *Attorney-General* [11] the Crown did not contend with regard to the policy that there was any passing under section 1. *Tennant* v. *Lord Advocate* [12] showed that a distinction cannot, for the purposes of these sections, be drawn between "policy" and "policy "moneys." [Reference was made to *Coutts & Co.* v. *Inland Revenue Commissioners.* [13]] *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [14] was the foundation of the fifth proposition above, which itself was the foundation of *Wrightson* v. *Inland Revenue Commissioners* [15] five years later. [Reference was made to *In re Barbour.* [16]] If the court accepts the submission for the plaintiffs that Captain Estcourt had in no sense a life interest, any distinction between the present case and *Wrightson* v. *Inland Revenue Commissioners* [17] would be fanciful.

B. L. Bathurst Q.C. and *E. Blanshard Stamp* for the Crown. Whether the case comes within *In re Barbour* [18] and *Wrightson* v. *Inland Revenue Commissioners* [19] depends on the construction of the resettlement. By clause 28 (2) "all those policies . . ." are assigned to the trustee. Where, then, was the beneficial interest in the policies during Captain Estcourt's life? It could have vested in him in one of two ways. The ". . . trusts . . . "hereinafter declared . . ." are in effect for him for life. Although, on the face of it, "policy moneys" is applied to those arising on maturity, it can include the policy; or there may be a resulting trust in favour of him. If there is a life interest in him, that is an end of the matter so far as Captain Estcourt is concerned. One way or another, there was a life interest in

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[6] [1907] A.C. 19; 23 T.L.R. 123, H.L.

[7] [1922] 2 K.B. 500; 38 T.L.R. 703, C.A.

[8] [1925] 2 K.B. 429.

[9] [1933] A.C. 257; 49 T.L.R. 169, H.L.

[10] [1939] Ch. 343; 55 T.L.R. 357; [1939] 1 All E.R. 196, C.A.

[11] [1939] Ch. 610; [1939] 2 All E.R. 72, C.A.

[12] [1939] A.C. 207; 55 T.L.R. 472; [1939] 1 All E.R. 672, H.L.

[13] [1953] A.C. 267; [1953] 3 W.L.R. 364; [1953] 1 All E.R. 418, H.L.

[14] [1953] A.C. 347; [1953] 1 All E.R. 403, H.L.

[15] [1958] A.C. 210; [1957] 2 All E.R. 745.

[16] [1956] Ch. 452; [1956] 2 W.L.R. 735; [1956] 1 All E.R. 627, C.A.

[17] [1958] A.C. 210.

[18] [1956] Ch. 452.

[19] [1958] A.C. 210.

Captain Estcourt. In *In re Barbour* [20] Lord Evershed M.R. and Romer L.J. construed the proceeds of the policy as being the policy moneys. In *Wrightson* v. *Inland Revenue Commissioners* [21] the words were more like those in the present case. It is nearer to the Crown's case here, but is not limited to moneys payable on maturity, but includes all bonuses and additions "assured by or to become payable under the said policies." Whether or not they strained the construction in *Wrightson* v. *Inland Revenue Commissioners*,[21] they had the above-cited words. In the present case Desmond's interest in the policy moneys was a life interest after his father's death. There is, in effect, a gift in the document itself during Captain Estcourt's life; or, if that be wrong, there has been no disposition at all during Captain Estcourt's life, in which case there is a resulting trust. If the true view is that Captain Estcourt had no interest in the policies, it becomes necessary to consider what would have happened to any income which might have been derived from the policies, or from investments representing the surrender value of the policies, during Captain Estcourt's lifetime. The only possible answer would be that any such income would have to be accumulated during the remainder of Captain Estcourt's life. In that event, there would have to be a change in the enjoyment of the income on Captain Estcourt's death, and the case would be covered by *In re Hodson's Settlement* [22]; and the policies would have passed under section 1 or section 2 (1) (*b*). There was no assignment of the policies to Desmond. All he got was a reversionary life interest after his father's death. That is the difference between *Lethbridge* v. *Attorney-General* [23] and *Attorney-General* v. *Hawkins*.[24] In the present case something has to be proved quite different from that which had to be proved in *Attorney-General* v. *Sandwich* (*Earl*).[25] Here there was a normal family resettlement which dealt, among other things, with the mortgages that Captain Estcourt had created on his life. That, however, does not make it a transaction of sale and purchase. [Reference was made to *Lethbridge* v. *Attorney-General*.[26]] Prima facie, Captain Estcourt provided the policies. True, a person can buy someone else's policy and settle it; but to support the proposition that Desmond provided these policies is not easy. It is for the plaintiffs to show that they really belonged to Desmond. The transaction under section 2 (1) (*d*) cannot be pure benevolence or entirely voluntary. The very words "in concert or by arrangement" themselves preclude that. It was not binding on Captain Estcourt's part, but that does not mean that he was not the settlor.

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[20] [1956] Ch. 452.
[21] [1958] A.C. 210.
[22] [1939] Ch. 343.
[23] [1907] A.C. 19.
[24] [1901] 1 K.B. 285.
[25] [1922] 2 K.B. 500.
[26] [1907] A.C. 19.

The real basis of *Lethbridge* v. *Attorney-General* [26] was that the son had made an absolute purchase of the policies for valuable consideration. The whole question in the present case would be different if Desmond had become entitled to the policies and then resettled them. But he never did become entitled to them. In *Lethbridge* v. *Attorney-General* [26] the son purchased the policies from the father and resettled them; that is the distinction between that case and the present case, which is really covered by *Attorney-General* v. *Hawkins*.[27] The facts in the present case are far more like those in *Attorney-General* v. *Hawkins* [27] than those in *Lethbridge* v. *Attorney-General*,[28] and it has never been said that *Attorney-General* v. *Hawkins* [29] was wrongly decided.

E. I. Goulding in reply. What this case has in common with *Lethbridge* v. *Attorney-General* [30] is that so far as the policies were concerned the father had been bought out. That distinguishes them both from *Attorney-General* v. *Hawkins*.[31]

If the contention for the plaintiffs that Captain Estcourt retained no interest in the policies and received full value for them is correct, they did pass on his death by reason only of the purchase.

There is no room for a resulting trust here. The fact that the beneficial ownership may not be decided does not mean that there is a resulting trust in favour of the settlor.

Cur. adv. vult.

April 6. CROSS J. read the following judgment, in which he stated the facts set out above, and continued: The first question which I have to consider is whether on the true construction of the resettlement Captain Estcourt had an interest in the policies which ceased on his death. Counsel for the commissioners submitted that he had, either because clause 28 (2) and (3) of the resettlement gave him such an interest, or, alternatively, because those clauses make no disposition of the beneficial interest in the policies during the rest of his lifetime and that, therefore, he took a life interest in them by way of resulting trust. I cannot accept either of these contentions. By clause 28 (2) the trustees are directed to hold the policies until Captain Estcourt's death and then to collect the policy moneys from the company, and in clause 28 (3) they are directed to hold the policy moneys subject to any appointment to the contrary under any of the joint powers therein mentioned "upon the trusts and subject to the powers "and provisions upon and subject to which capital money or "investments representing the same would be held." That means, I think, so far as the policy moneys are concerned, on the trusts of the settlement subsisting at Captain Estcourt's death, i.e., in the events which happened, on trust for Desmond for life with remainders over. Captain Estcourt was not given a life interest in the policies, nor did he take any interest in them by way of resulting trust, since they were held from the first on trust for those beneficially interested after his death. The case is, in my judgment, distinguishable from the cases of *Westminster Bank Ltd.* v. *Inland Revenue Commissioners* [1] and *Wrightson* v. *Inland Revenue Commissioners*.[2] In both those cases the fully-paid policies in question were on the life of the settlor. He was given no interest in them; but it was held that the settlements on their true construction gave vested life interests in possession in them before the settlor's death to the same persons as would become entitled to life interests in the policy moneys on the death of the settlor if the policies remained in force until that date. It was, that is to say, the view of the majority of the House of Lords that if the policies had been surrendered in the lifetime of the settlor, or the insurance companies had been liquidated and the trustees had received a dividend in the liquidation, the life-tenants would have been entitled to be paid the income of the investments representing the surrender moneys or the dividend in the liquidation. Here, on the other hand, if the policies had been surrendered in Captain Estcourt's lifetime, or the trustees had received a dividend in the liquidation of the insurance company, I do not think that either Captain Estcourt or Desmond, acting independently, could have required the trustees to invest the surrender moneys or dividend and pay him the income of the investments during the rest of Captain Estcourt's lifetime. Captain Estcourt was given no life interest whatever in the policies, and Desmond's life interest in the policy moneys was only to begin on Captain Estcourt's death. What the position would have been had Captain Estcourt and Desmond in such circumstances purported to exercise the joint power of appointment I do not say. But in the absence of such exercise the court would, I think, have directed either that the surrender moneys or dividend be applied in the purchase of another fully-paid policy payable on Captain Estcourt's death, or, if it had directed the money to be invested, would have ordered the income to be accumulated for the rest of Captain Estcourt's lifetime.

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[26] [1907] A.C. 19.
[27] [1901] 1 K.B. 285.
[28] [1907] A.C. 19.
[29] [1901] 1 K.B. 285.
[30] [1907] A.C. 19.
[31] [1901] 1 K.B. 285.

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[1] [1958] A.C. 210.

[2] Ibid.

Counsel for the commissioners then submitted that even if the true view was that Captain Estcourt had no interest in the policies they nevertheless passed under section 1 or section 2 (1) (*b*) on his death by reason of the change in the respective interests of Desmond and the remaindermen in them which then took place. If the policies had been surrendered, their proceeds invested, and the income accumulated for the rest of Captain Estcourt's lifetime, there is no doubt that the investments and accumulations would have been liable to estate duty on his death. The income, which up to the date of his death would have been applied primarily for the benefit of capital, would, on his death, have begun to be paid to Desmond. By reason of this change in the enjoyment of the income the investments and accumulations would have "passed" on Captain Estcourt's death: see *In re Hodson's Settlement.*[3] Counsel argued that if the respective rights of Desmond and the remaindermen in the policies during Captain Estcourt's lifetime were such that had the policies been surrendered and the proceeds invested, the income of the proceeds would have been accumulated, it followed that the unsurrendered policies ought to be held themselves to pass on Captain Estcourt's death when the policy moneys became payable, and Desmond began to enjoy a life interest in possession in them. This is a novel contention on the part of the Revenue. In *Westminster Bank Ltd.* v. *Attorney-General*[4] the Attorney-General accepted the position that in circumstances such as these duty was not payable under section 1 of the Finance Act, 1894, on the capital value of the policy moneys, but only under section 2 (1) (*d*) on the value of the life interest in them which came into possession on the death of the life assured. Again, in the two cases in the House of Lords in 1958, duty was only claimed under section 2 (1) (*d*) on the value of the life interests arising on the death of the settlors. But counsel for the commissioners submitted that the *D'Avigdor-Goldsmid* case[5] had shown that the old view that estate duty on life policies was payable under section 2 (1) (*d*) on the arising of a beneficial interest in the policy moneys on the death of the life assured was wrong in principle, and that if one concentrated one's attention, as it now appeared that one should, on the rights of the beneficiaries in the policy itself, it followed that the policy itself passed under section 1 or section 2 (1) (*b*) in such a case as this. I cannot accept this argument. It is true enough that if the policies had been surrendered and the income of the invested proceeds had been accumulated, the investments and accumulations would have passed under section 1 on the death of Captain Estcourt, but I do not think that it follows in the least from this that the unsurrendered policies passed under section 1 on his death. If the policies had been surrendered and the proceeds invested, the remaindermen would have had an interest in the income which accrued and was invested during Captain Estcourt's lifetime. The longer he lived the larger the accumulation would be. There would, therefore, have been a real change in the respective interests of Desmond and the other beneficiaries on Captain Estcourt's death. But, in fact, the policies were retained and never yielded any income during Captain Estcourt's lifetime. In such circumstances nothing passed from the other beneficiaries to Desmond on the death of Captain Estcourt. All that happened was that Desmond's life interest in the policy moneys which had previously been a reversionary life interest became a life interest in possession, and that the interests of the other beneficiaries in the policy moneys which had previously been doubly reversionary in that they were expectant on the death both of Captain Estcourt and of Desmond, became expectant only on the death of Desmond. In my judgment, therefore, the claim of the commissioners to duty on the capital of the policy moneys under section 1 or section 2 (1) (*b*) fails quite apart from the fact that this settlement was not a voluntary settlement. On the other hand, if it had been a voluntary settlement, I cannot see how the claim for duty under section 2 (1) (*d*) on the value of Desmond's life interest could have been resisted. I understood counsel for the plaintiffs to submit that Desmond had a life interest in possession in the policies before Captain Estcourt's death but, as I have said, I think that his life interest was reversionary until Captain Estcourt's death.

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[3] [1939] Ch. 343.

[4] [1939] Ch. 610.

[5] [1953] A.C. 347.

I turn, therefore, now to consider whether the prima facie claim for duty on the value of Desmond's life interest under section 2 (1) (*d*) is affected by the fact that the resettlement was the outcome of a bargain between Captain Estcourt and Desmond. Section 3 (1) of the Finance Act, 1894, provides that estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit, and subsection (2) provides that where any such purchase was made for partial consideration in money or money's worth paid to the vendor for his own use and benefit, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty. Counsel for the plaintiffs contends that in this case, if the policy moneys passed at all they passed by reason only of a purchase of them by Desmond from his father for full consideration in money or money's worth. Captain Estcourt received under the family arrangement (a) the reversion on his death to a sum of £26,750, and (b) the extinction of the terminable rentcharges. What he gave in exchange for this was (a) the two fully-paid policies on his life, and (b) the rentcharges payable to Desmond or his family during his life. Counsel submitted that as Captain Estcourt was 72 years old at the time, it was clear that what he received was worth more than what he gave, and that, therefore, the conditions of exemption contained in section 3 were satisfied.

In *Attorney-General* v. *Hawkins* [6] the court had to consider the application of section 3 to a family arrangement of this sort. There, as here, the family property had been settled on the father for life with remainder to the son in tail male. The father had borrowed a large sum on the security of his life interest coupled with policies of assurance on his life. In addition, he owed considerable unsecured debts. His son, too, was in financial difficulties. By arrangement between them the property was disentailed and resettled, subject to a joint power of appointment, on the father for life with remainder to the son absolutely. The son then joined with the father (1) in converting the mortgages on the father's life interest into mortgages on the fee simple of the property, and (2) in raising substantial sums out of capital to discharge his father's unsecured debts. In return the son had paid to him a smaller sum out of capital and was given an annuity during his father's lifetime. Further, the father assigned the policies to trustees and charged his life interest with payment of the premiums on them and the interest under the mortgages. It was provided that if any of the policies, some of which were terminable policies, became payable in the father's lifetime, the trustees should apply the moneys received in reduction of the mortgages. Subject to that provision the policies and the moneys payable under them were held in trust for the son absolutely. No moneys became payable under any of the policies during the father's lifetime, and on his death the Crown claimed estate duty under section 2 (1) (*d*) on the moneys which then became payable to the son. It was argued for the son that the arrangement was a transaction under which he had acquired the absolute interest in the policies for full consideration and that, therefore, the exemption under section 3 (1) applied. Kennedy and Phillimore JJ. rejected that contention. They were prepared to assume that the father received full consideration for anything that he gave up under the arrangement, but they held that, nevertheless, he had not sold the policies to his son. The policies were brought into settlement to replace as far as possible the capital that was taken out, and the son had no title to them in possession until his father's death. Counsel for the plaintiffs sought to distinguish that case from this on the ground that in *Attorney-General* v. *Hawkins* [7] it was possible that the father himself might derive some benefit from the policies before he died, because a terminable policy might have become payable in his lifetime and the proceeds used in reduction of the mortgage, the interest on which the father had to pay. But what prevented the court from holding that the son had purchased the policies from his father was the fact that the son did not obtain complete dominion over them, not the fact that the other person who had an interest in them was the father. In this case, although Captain Estcourt retained no interest in the policies, Desmond did not obtain an absolute interest in them. It was part of the arrangement that they were to be brought into settlement to benefit the remaindermen as well as Desmond. *Attorney-General* v. *Hawkins* [8] is, therefore, to my mind, indistinguishable in principle from this case, and if it is still good law it is decisive against the second contention of the plaintiffs.

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[6] [1901] 1 K.B. 285.

It was argued, however, that the later case of *Lethbridge* v. *Attorney-General* [9] shows that *Attorney-General* v. *Hawkins* [10] was wrongly decided. There again, a father who was tenant for life of a family estate, had raised money by charges on his life interest supported by policies of assurance on his life. By a family arrangement between him and his son, who was tenant in tail, the estates were disentailed and the son concurred with his father in mortgaging them for a sum sufficient to pay the father's debts. In return, the father assigned the policies to the son and created a trust of the rents during his life for payment of the interest on the mortgages, the premiums on the policies, and an annuity to the son. Subject to these trusts, the estates were resettled on the father for life with remainder to the son. It will be seen that in the *Lethbridge* case,[11] unlike the *Hawkins* case,[12] the policies were assigned out and out to the son. He could have surrendered them at any time, and, as the House of Lords held, if he had done so he would have remained entitled to be paid out of the rents during his father's lifetime a sum equal to the premiums. On these facts the House of Lords, reversing the Court of Appeal, held that no estate duty was payable on the policy moneys under section 2 (1) (*d*) on the father's death. The only member of the House who referred to *Attorney-General* v. *Hawkins* [12] was Lord Atkinson. He regarded the point in issue as being whether or not section 3 of the Act of 1894 applied to the case. He held that it did, and distinguished *Attorney-General* v. *Hawkins* [12] on the ground that there the policies had not been assigned absolutely to the son. Lord Loreburn and Lord Macnaghten, on the other hand, with whom the other members of the House concurred, decided the case independently of section 3 on the ground that the father could not be said on the facts to have "provided" the policies within the meaning of section 2 (1) (*d*) at all. Counsel for the plaintiffs submitted that the reason why Lord Loreburn and Lord Macnaghten held that the father did not provide the policies was simply the fact that he had received full consideration for anything that he gave up under the arrangement with his son, and he argued that as in this case Captain Estcourt received full consideration for everything which he gave up under the arrangement, he did not provide the two policies in question, even if he cannot be said to have sold them to Desmond. Now, undoubtedly, there are passages in the speeches of Lord Loreburn and Lord Macnaghten which lend colour to this submission. Thus Lord Loreburn, after pointing out that the general purpose of section 2 (1) (*d*) was to prevent a man escaping estate duty by subtracting from his means during his life money or money's worth which was to reappear when he died in the form of a beneficial interest arising on his death, said [13] that the father in the case before him had subtracted nothing from his means since he had received full consideration from his son for his assignment of the policies and the charge of the premiums on his income. Again, Lord Macnaghten [14] pointed out that it was not by the father's gift, or at his cost, or by means of any expenditure on his part that the policies were vested in the son, since the father received full consideration from the son for everything which he gave up. Further, it is to be observed that these very passages in the speeches of Lord Loreburn and Lord Macnaghten were referred to by the Privy Council in *Ward* v. *Inland Revenue Commissioners* [15] as showing that the House of Lords in the *Lethbridge* case [16] construed the word " provided " in section 2 (1) (*d*) as carrying with it the idea of bounty on the part of the deceased. " Where," asked counsel for the plaintiffs, " is the " element of bounty in this case? " On the other hand, I find it difficult to believe that Lord Loreburn and Lord Macnaghten were really intending to say that, even in a case where it was part of the arrangement between father and son that the policies should be brought into settlement by the father for the benefit of other persons as well as the son, the fact that the father received full consideration from the son for everything which he gave up, including the policies, must itself necessarily involve the consequence that the father did not " provide " the policies within the meaning of section 2 (1) (*d*). In the first place, if their Lordships meant that, it would appear to follow that *Attorney-General* v. *Hawkins* [17] was wrongly decided. That case was argued purely on section 3. It appears never to have occurred to anyone to suggest that the father did not provide the policies. Yet he received full consideration for bringing them into settlement and, therefore, on the view which I am considering, the case was not within section 2 (1) (*d*) at all. Again, if Lord Loreburn and Lord Macnaghten meant what counsel for the plaintiffs submits that they meant, it would have been unnecessary for them to stress, as each of them did, that the son in the *Lethbridge* case [18] became the absolute owner of the policies. Of course, if the creation of interests in the policies in other persons is simply the act of the son—if the father is prepared to agree to the son taking the policies absolutely, and the son decides on his own account to allow them to be brought into settlement—one can see that it is the son and not the father who really provides the policies for the beneficiaries. But where, as here, it is part of the arrangement between father and son that the policies shall be brought into settlement by the father for the benefit of others as well as the son, I should have thought that the policies could fairly be said to have been provided for the beneficiaries by the father, by arrangement with the son, even though the father received under the arrangement full consideration for everything which he gave up, including the policies. From the point of view of the remaindermen, the father here was one of the providers of the policies, even though he may have driven a hard bargain with the son in insisting that they should be brought into settlement and not given to the son absolutely. If I were satisfied that the House of Lords in the *Lethbridge* case [19] intended to hold that there should be read into section 2 (1) (*d*) some such words as "to the "extent that such purchase or provision is an act of bounty on the "part of the deceased," I should, of course, give effect to that view without hesitation; but as I am by no means clear that they meant so to decide, I feel at liberty to give effect to my own view of the question, and to leave it to a higher court to say that *Attorney-General* v. *Hawkins* [20] was wrongly decided. On the second point, therefore, I hold that the plaintiffs fail.

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[7] [1901] 1 K.B. 285.

[8] Ibid.

[9] [1907] A.C. 19.

[10] [1901] 1 K.B. 285.

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[11] [1907] A.C. 19.

[12] [1901] 1 K.B. 285.

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[13] [1907] A.C. 19.

[14] Ibid.

[15] [1956] A.C. 391, 401, 402; [1956] 2 W.L.R. 578; [1956] 1 All E.R. 571, P.C.

[16] [1907] A.C. 19.

[17] [1901] 1 K.B. 285.

[18] [1907] A.C. 19.

There remains one other matter to be mentioned. If the plaintiffs in a case of this sort claim that the property in question is wholly or partially exempt from duty on the ground that full or partial consideration has been given to the deceased, they ought, I think, to file evidence with regard to the value of the consideration unless it is agreed by the commissioners. In this case there was no evidence before me as to the value of what Captain Estcourt received under the arrangement as compared with what he gave up, and counsel for the commissioners, while admitting, as is indeed obvious, that Captain Estcourt received some consideration for the settlement of the policies, did not admit that it was full consideration. In the view which I have formed, the point does not arise, for I have held that even on the assumption that he received full consideration duty is payable; but if a higher court holds that I am wrong on this point then, unless the parties can agree the figures, the question of the value of the consideration will have to be decided on proper evidence.

[19] [1907] A.C. 19.

[20] [1901] 1 K.B. 285.

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CHILD'S TRUSTEE CO. *v.* INLAND REVENUE COMRS.

The result is that I declare that estate duty is payable on the value of Desmond's life interest. With regard to costs, as the commissioners have not wholly succeeded, and it is a drawn battle, I will not make an order.

Declaration accordingly.
No order as to costs.

Solicitors: *Lawrence Graham & Co.; Solicitor of Inland Revenue.*

K. R. A. H.

PIKE AND OTHERS *v.* MICHAEL NAIRN & CO. LTD.

[1959 P. 758.]

1960
March 22;
April 7.

Cross J.

Practice—Originating summons—Service—Waiver—Originating summons by tenants for grant of new tenancy—Summons not served on landlords—Summons adjourned generally on tenants' application—No application by tenants to restore—Application by landlords to dismiss summons for want of prosecution—Whether landlords entitled to be heard—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 64 (1)—*R.S.C., Ord.* 53D, *r.* 5 (1) (2) (3), *r.* 6; *Ord.* 54, *r.* 4E.

Tenants took out an originating summons, to which they made their landlords respondents, asking for a new tenancy of the demised premises under Part II of the Landlord and Tenant Act, 1954.[1] The summons stated that the landlords had given a notice

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[1] Landlord and Tenant Act, 1954, s. 64: "(1) In any case where—"(a) a notice to terminate a tenancy "has been given under Part I or Part "II of this Act or a request for a "new tenancy has been made under "Part II thereof, and (b) an application to the court has been made "under the said Part I or the said "Part II, as the case may be, and "(c) apart from this section the effect "of the notice or request would be to "terminate the tenancy before the "expiration of the period of three "months beginning with the date on "which the application is finally disposed of, the effect of the notice or "request shall be to terminate the "tenancy at the expiration of the said "period of three months and not at "any other time."

R.S.C., Ord. 53D, r. 5: "(1) An "originating summons under any of "the preceding rules shall be instituted "in the matter of the property in question and of the Act under which the "claim or application is made and no "appearance need be entered thereto. "(2) Any such summons shall be "returnable at a date which will "allow at least 14 days to elapse "between the date of the service on "the respondent and the return date. "(3) No affidavit shall be filed in the "first instance in support of or in "answer to any such summons, but purporting to determine the tenancy on June 24, 1959, and that they would oppose any application to the court for the grant of a new tenancy on the ground that they intended to demolish the premises or a substantial part thereof. The tenants did not serve the summons on the landlords, but themselves, on May 6, attended before the master and obtained an order that the summons stand over generally with liberty to restore. By chance a representative of the landlords' solicitors was present and heard the order made. The tenants never applied to restore the summons and on February 24, 1960, the landlords took out a summons asking that the tenants' originating summons be dismissed for want of prosecution. On a contention by the tenants that the landlords, not having been served with the originating summons, had no locus standi and could not be heard unless and until the tenants chose to serve it on them:—

Held, that defendants or respondents to an originating summons, which was analogous to a writ, could waive service of the summons on themselves and enter an appearance to it, and that, since R.S.C., Ord. 53D, r. 5 (1), provided that an appearance need not be entered, the landlords could, if they chose, claim to be heard on the summons. Accordingly, the summons must be referred back to the master with directions to hear it, after giving each side an opportunity to file evidence.

Per curiam. This case illustrates the urgent need for reform of the existing procedure in cases under Part II of the Landlord and Tenant Act, 1954, the unsatisfactoriness of which was pointed out by the Committee on Chancery Chambers and the Chancery Registrars' Office in paragraphs 68 and 72 of their report. So long as the rules do not provide for the automatic dismissal of a summons which is not promptly served, there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket; but where, as here, applicants obtain a return day and appear before the master, and the respondents do not appear, masters should in future inquire if the summons has been served, and, if it has not, direct service of it unless they are satisfied that the respondent knows of its issue and consents to its standing over.

"on the return day or at any subsequent hearing such directions shall "be given as to the filing of affidavits "and otherwise as to the course of "the proceedings (including, if need "be, the giving of notice to other "persons or the making of other "persons parties to the proceedings) "as may appear expedient."

R. 6: "(1) Any person affected by "any proceedings on any originating "summons under r. 2 or r. 3 of this "Order may apply in Chambers to "be made a party to the summons "and the court or judge may give "such directions in the matter as may "appear necessary."

Ord. 54, r. 4E: "Every summons, not being an originating "summons to which an appearance is "required to be entered, shall be "served two clear days before the "return thereof unless in any case it "shall be otherwise ordered: Provided "that in case of summonses for time "only, the summons may be served "on the day previous to the return "thereof."

PROCEDURE SUMMONS.

The following statement of facts is taken from the judgment of Cross J.: On April 13, 1959, the applicants, Oliver Noel Pike, Sam Rostron and Doreen Mary Pike, who claimed to hold a tenancy of certain premises at Greenwich from the respondents, Michael Nairn & Co. Ltd., took out an originating summons to which they made that company respondents, asking for the grant of a new tenancy of the premises under Part II of the Landlord and Tenant Act, 1954. It was stated in the body of the summons that on December 16, 1958, the respondents had given a written notice to the first two applicants purporting to determine the tenancy on June 24, 1959, and saying that they would oppose any application for the grant of a new tenancy on the ground that they intended to demolish the premises, or a substantial part of them. By virtue of section 64 (1) of the Landlord and Tenant Act, 1954, the issue of the summons had the effect of extending any existing tenancy of the applicants until the expiration of three months from the date when the application should be finally disposed of. Order 53D, rule 5 (1), provided that no appearance need be entered to an originating summons asking for a new tenancy under the Act of 1954. The summons issued in this case was therefore in the form prescribed in Appendix K, No. I.G., to the Rules of the Supreme Court. It called on the respondents to attend on the hearing of this application before the master at his room at the Royal Courts of Justice at the time specified in the margin—which was May 6, 1959, at 11.30 in the morning. It further informed them that they need not enter an appearance, but that if they did not attend by their solicitor at the time and place mentioned such order would be made and proceedings taken as the judge might think just and expedient.

The applicants did not serve the summons on the respondents at all, but they attended themselves before the master on May 6 and asked for and obtained an order that the summons should stand over generally with liberty to restore. By pure coincidence, a representative of the solicitors acting for the respondents happened to be in the master's room at the time waiting for another case in which he was engaged to come on, and heard what was done in this case on that occasion. No step was since taken by the applicants to restore the originating summons.

On February 24, 1960, the respondents took out a summons against the applicants in the pending proceedings asking for an order that the originating summons be dismissed for want of prosecution on the ground that the applicants had failed to serve it on the respondents or to take any steps to proceed with it since the date of its issue, or for such further or other order or direction as the court might think fit to make. The applicants contended that the respondents, not having been served with the originating summons, had no locus standi in the case at all and that, unless and until the applicants chose to serve the originating summons on them, they could not be heard.

G. Avgherinos for the respondent landlords. This case raises the question whether, where a tenant has taken out a summons and deliberately refrains from serving it on the landlord, the landlord can do anything to bring it on.

[*R. E. Megarry Q.C.* (for the applicant tenants). The point will be taken on behalf of the tenants that the landlords have no locus standi and cannot be heard.]

The purpose of the present application is to ask the court to make some form of order to bring the summons on. In the normal case it is the applicant who is anxious to get it on. The Act, however, gives a tenant, once he has started proceedings, an automatic extension of his current tenancy for a period of three months after the final disposal of the proceedings. [Reference was made to Landlord and Tenant Act, 1954, Part II.] The Act introduced a new code of protection for business tenants. The existing tenancy is automatically continued until the landlord serves notice or until the tenant applies for a new tenancy in a particular form: see section 24 (1) (*a*) (*b*). In the present case it was terminated by a notice under section 25.

Even if a tenant has a good case he has certain advantages in delaying legal proceedings. If he has a bad case the incentive to delay is even greater. The question in the present case is whether by refraining from serving the proceedings the tenants can paralyse the landlords. On the true construction of the rules there is nothing to prevent the landlords intervening and asking for directions. [Reference was made to Order 53D, rule 5.] On the rules, there is an implication that the summons must be served. Rule 6 shows the absurdity of the situation if the landlord cannot make an application, because it deals with persons affected by the proceedings. Sub-rule (3) of rule 5 is very wide and gives the court power to order that any person be given notice of the proceedings. It would be quite absurd if a person who is a party (e.g., a landlord) should be in a worse position than one who is not (e.g., "any person" who is ordered to be given notice). There is nothing in the rules to prevent the landlord from making an application in the proceedings before he has been served.

In *Kistler* v. *Tettmar*[2] the defendant had an order made against him. He failed to comply with it and there was an application to commit him. He evaded service and the court indicated that it was absurd that he should be protected by his own reluctance to accept proceedings. A defendant is entitled to waive service of a writ and enter an appearance and there is no distinction for this purpose between a writ and an originating summons. [Reference was made to *Fell* v. *Christ's College, Cambridge*,[3] and *Bolton's (House Furnishers) Ltd.* v. *Oppenheim*.[4]]

In the present case, if there are good reasons why these proceedings should be adjourned, the court can take them into account when dealing with the landlords' application. For the tenants it is stated that they are not prepared to have directions given, an attitude obviously adopted because the present position suits the tenants. The landlords are asking that the summons be dismissed for want of prosecution; but what they are really asking is that the matter be referred to the master to come on on a fixed day. Having waited for 10 months, they are entitled to that order. On their behalf little is said about the merits at this stage: they can be considered on the appointment before the master.

R. E. Megarry Q.C. and *Leslie Joseph* for the applicant tenants. The tenants resist this application on two grounds. First, as the summons has not been served, the landlords have no locus standi to apply for either form of the relief which they seek. Secondly, even if they have, there is no jurisdiction to dismiss an originating summons for want of prosecution unless there is an abuse of the process of the court; and there is nothing to suggest such an abuse in this case. A tenant must issue his originating summons in due time, but having done that, he "may put it in "his pocket for as long as he chooses": *per* Harman J. in *In re Nos. 55 to 57 Holmes Road, Kentish Town*.[5] See, too, the Report of the Committee on Chancery Chambers and the Chancery Registrars' Office (1960), Cmnd. 967, where, in paragraph 68, it is said that when the summons has been duly issued, "a landlord has no "right to apply to dismiss it when he gets to hear of it"; and see paragraph 72. There is no provision in the rules for the dismissal of an originating summons (as distinct from a writ) for want of prosecution.

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[2] [1905] 1 K.B. 39; 21 T.L.R. 24, C.A.

[3] (1787) 2 Bro.C.C. 278.

[4] [1959] 1 W.L.R. 685, 913, C.A.; [1959] 3 All E.R. 90.

[5] [1959] Ch. 298, 305.

The whole basis of a tenant's application under the Act is that a valid notice has been served on him. In the present case there are serious questions which must be resolved before it can be decided whether or not the notice is valid, such as whether any tenancies exist, and if so, what they are, or whether there is merely a licence; and whether or not certain other notices were valid and effective, depending on whether the tenants were the company or certain individuals. These questions raise difficult points of law and fact which ought to be determined in separate proceedings which distinctly raise these issues. The landlords are perfectly well able to have these issues determined, e.g., by issuing a writ claiming a declaration. It is quite wrong to say that there is nothing that the landlords can do. The tenants are under no obligation to "make the running." The need for a summons or writ to raise these questions before the summons under the Act can be determined is well settled: see *Tennant* v. *London County Council*[6] (where the preliminary issue was merely whether the notice had been properly signed, and so was much simpler than in the present case), and *Bolton's* (*House Furnishers*) *Ltd.* v. *Oppenheim.*[7] [Reference was made to *Rhyl Amusements Ltd.* v. *Rhyl Urban District Council.*[8]]

It is accepted that the present rules governing the procedure are unsatisfactory, but the remedy is to amend the rules, not to read into them something that is not there. This is not a case in which the court should be astute to find some basis on which to reach tenants who, in other cases, may be unmeritorious. There is nothing in Order 53D, rules 4, 5 or 6, to give the court any jurisdiction to allow a respondent who has not been served to apply to the court for orders or directions in the proceedings. *Fraser* v. *Cooper Hall & Co.*[9] shows that in modern practice the ancient Chancery practice of permitting the entry of an appearance gratis, as in *Fell* v. *Christ's College, Cambridge,*[10] does not apply. Whatever may have been the practice as to entering an appearance to a bill in Chancery, an originating summons is a relatively modern creature of statute, and as there is no provision for the entry of an appearance gratis to such a summons, there is no right to do so. [Reference was made to *In re Tuck.*[11]] Even if such

[6] (1957) 121 J.P. 428, C.A.

[7] [1959] 1 W.L.R. 685, 913, C.A.

[8] [1959] 1 W.L.R. 465; [1959] 1 All E.R. 257.

[9] (1883) 23 Ch.D. 685.

[10] 2 Bro.C.C. 278.

[11] [1906] 1 Ch. 692; 22 T.L.R. 425, C.A.

an appearance could be entered, the landlords have not done so, and they must do so before they can be heard.

G. Avgherinos, in reply, referred to *Oulton* v. *Radcliffe*.[12]

Cur. adv. vult.

April 7. CROSS J. read the following judgment, in which he stated the facts and continued: Order 54, rule 4E, provides that every summons, not being an originating summons to which an appearance is required to be entered, shall be served two clear days before the return thereof unless in any case it shall be otherwise ordered; but rule 5 (2) of Order 53D provides that an originating summons under the Act of 1954 shall be returnable at a date which will allow at least 14 days to elapse between the date of service on the respondent and the return date. Rule 5 (3) of the same Order provides that no affidavit need be filed in the first instance in support of or in answer to any such summons but that on the return day or at any subsequent hearing such directions shall be given as to the filing of affidavits and otherwise as to the course of the proceedings including, if need be, the giving of notice to other persons or the making of other persons parties to the proceedings, as may appear expedient. These rules obviously assume that the applicant will serve the summons on the respondent at least 14 days before the return date, and that the respondent will have an opportunity of attending on that date before the master and making such representations as he wishes to make with regard to the future course of the proceedings. [His Lordship referred to the facts and continued:]

I should be very sorry to have to give effect to the applicants' contention. By the mere issue of a summons under this Act the tenant extends his existing tenancy until the proceedings are disposed of. If the rent which he is paying is less than the rent which he will have to pay under a new lease, if he gets one, he has an incentive to delay the proceedings as long as possible, and the worse his case the greater is the incentive. Since the rules do not provide that a summons shall lapse if not served within a specified time an obvious means of gaining time is to issue the summons and not serve it. There may, of course, be cases in which it is right that the application for a new tenancy should stand over pending the determination of some other issue between the parties with regard to the existing tenancy, but even in such cases the respondent should have an opportunity of being heard

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[12] (1874) L.R. 9 C.P. 189.

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when the question of standing over the summons is being considered. I am, therefore, glad to say that, in my judgment, the applicants' submission is unfounded. The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him: see *Fell* v. *Christ's College, Cambridge*[1]; *Oulton* v. *Radcliffe.*[2] Counsel for the applicants, while conceding that a defendant to an action commenced by writ—which is the traditional process of the court—could enter an appearance without being served, contended that a defendant or respondent to an originating summons could not do so, since the originating summons is simply the creature of the Rules of Court made under the Judicature Act. In this connection he relied on the decision of Bacon V.-C. in *Fraser* v. *Cooper-Hall.*[3] In that case, defendants, who were thinking of bringing a counterclaim not only against the plaintiffs but also against a third person who was not a party to the action, delivered their defence and counterclaim, which named the third party as one of the defendants to the counterclaim, to the solicitors acting for the plaintiffs, who happened also to be the solicitors for the third party. These solicitors purported to enter an appearance on behalf of the third party to the counterclaim, though it had never been served on him under the rule which then corresponded to Order 21, rule 12. The judge held that although, for some purposes, counterclaims were to be treated as independent actions, someone who was not a party to an action who happened to hear that the defendants had printed and delivered to the plaintiffs a defence and counterclaim which named him as a defendant to the counterclaim, was not entitled to enter an appearance to the counterclaim as though the delivery of the counterclaim to the plaintiffs was equivalent to the issue of a writ against him. That case does not appear to me to have any bearing on this. An originating summons is strictly analogous to a writ; indeed, in some cases at least, proceedings started by originating summons are "actions" within the meaning of that word as used in the Rules of Court, and I see no reason why a defendant or respondent to an originating summons should not be able to waive service of the summons on him and enter an appearance to it.

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[1] (1787) 2 Bro.C.C. 278.

[2] (1874) L.R. 9 C.P. 189.

[3] (1883) 23 Ch.D. 685.

The applicants then point out that, even if this is so, the respondents in this case have not in fact entered an appearance, but Order 53D, rule 5 (1), provides that they need not do so, and therefore, in my judgment, they can, if they choose, waive service and claim to be heard on the summons.

Suppose that the respondents, having heard of the issue of this summons, had instructed their solicitors to appear for them on the return day—as the summons directed—and to oppose an adjournment, could the applicants have prevented the master from hearing them? Counsel for the applicants was forced to submit that they could, and in order to make his case consistent he was forced to go further and submit that the master would have had no power under rule 5 (3) to order the applicants to serve the summons on the respondents. This is a reductio ad absurdum of the whole argument. Order 53D, rule 6, provides that persons who have not been made parties to the summons in the first place may apply to the court to be joined as parties. It would be the height of absurdity if a man who has not been named as a party at all could claim to be heard, while a man who had been made a party had no locus standi because he had not been served.

Counsel for the applicants finally submitted that even if the respondents could be heard, they could not under the rules apply to dismiss the originating summons for want of prosecution unless the case amounts to an abuse of the process of the court. I have not heard the respondents on that point, and I express no view on it, nor do I express any view as to whether what the applicants have done or have not done in this case amounts to an abuse of the process of the court. Their failure to serve the summons on the respondents certainly calls for some explanation, but they may be able to give some explanation of it which does not involve an admission that they have abused the process of the court. All that I shall do is to send the summons back to the master with directions to him to hear it after giving each side an opportunity to file such evidence on it as they wish.

In conclusion, I would add this. The Committee on Chancery Chambers and the Chancery Registrars' Office have pointed out in paragraphs 68 and 72 of their recent report,[4] that the existing

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[4] Report of the Committee on Chancery Chambers and the Chancery Registrars' Office (1960), Cmnd. 967: Para. 68: "Forms of Originating "Summons. These are multifarious "at present and have been increased "in recent years as can be seen by "the fact that Orders 53 to 55 are "continually being extended. We "can see no reason why proceedings "under statutes should be differen- "tiated one from another nor why in

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procedure in cases under Part II of the Landlord and Tenant Act, 1954, is very unsatisfactory. This case illustrates how urgently it is in need of reform. So long as the rules contain no provision for the automatic dismissal of a summons which is not promptly served, there appears to be nothing to prevent an applicant from issuing a summons and putting it in his pocket. Where, however, as here, the applicants obtain a return day and appear before the master on it, and the respondents do not appear, I think that, in order to prevent abuse so far as possible, the masters should in future inquire whether the summons has been served, and if it has not been should direct service of it, unless they are satisfied that the respondent in fact knows of its issue and consents to its standing over.

Orders accordingly.

Solicitors: *Dodsworth & Co.; Cliftons.*

K. R. A. H.

"some cases it should be thought "right to name no plaintiffs or "defendants but only applicants and "respondents. This is a mere trap "for the unwary. Again there seems "no reason why in some cases no "appearance needs to be entered "while in others it may be required. "A striking example of the former is "in proceedings under Order 53D "(Landlord and Tenant Act, 1954, "Part II). These are largely contentious, but no appearance is necessary, nor, indeed, is service of the "summons, for a tenant who wishes "to remain in occupation has only to "issue a summons under the rule for "time to run in his favour, and a "landlord has no right to apply to "dismiss it when he gets to hear "of it."

Para. 72: "We think that to "apply procedure by originating summons to such controversies as arise "under, for instance, the Landlord "and Tenant Act, 1954 (Part II), the "Mines (Working Facilities and Support) Act, 1923, and very often under "Ward of Court Proceedings was a "retrograde step. We should like to "see it reversed, but if it is to be "retained, we think oral evidence "should be ordered as soon as any "conflict of fact appears to be likely."

INLAND REVENUE COMMISSIONERS *v.* HARTON COAL CO. LTD.

1960
May 31;
June 1, 3.

Pennycuick J.

Revenue — Surtax — Company — Subsidiary company — Direction that company's income be treated as members' income—Shares held by three companies—"Management" share held jointly in beneficial ownership by two companies — Whether "control" — Whether a "subsidiary company"—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 (6)—*Finance Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 19 (1) (*a*)—*Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 14 (1) —*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 256.

Company—Control—Company surtax purposes—Whether control related to beneficial ownership—Finance Act, 1922, *s.* 21 (6)—*Finance Act,* 1936, *s.* 19 (1) (*a*)—*Finance Act,* 1937, *s.* 14 (1)—*Income Tax Act,* 1952, *ss.* 245, 256.

At the material time[1] section 21 of the Finance Act, 1922, provided that directions might be made that for purposes of assessment to surtax the income of a company should be deemed to be the income of its members. By subsection (6) as amended "This section "shall apply to any company which is under the control of not more "than five persons and which is not a subsidiary company. . . . A "company shall be deemed to be a subsidiary company if, by reason "of the beneficial ownership of shares therein, the control of the "company is in the hands of a company not being a company to "which the provisions of this section apply, or of two or more "companies none of which is a company to which those provisions "apply."

Section 19 (1) of the Finance Act, 1936, provided that "For the "purposes of subsection (6) of section 21 of the Finance Act, 1922, "a company shall be deemed to be under the control of not more "than five persons—(*a*) if any five or fewer persons together exercise, or are able to exercise . . . control, whether direct or indirect, "over the company's affairs, and in particular . . . if any five or "fewer persons together possess . . . the greater part of the share "capital or voting power of the company."

By section 14 (1) of the Finance Act, 1937, "Notwithstanding "anything in subsection (6) of section 21 of the Finance Act, 1922, "a company which is deemed for the purposes of that subsection "to be under the control of not more than five persons shall not be "deemed to be a subsidiary company, unless it can be deemed to be "under the control of not more than five persons only by including "among the persons mentioned in paragraph (*a*) . . . of subsection "(1) of section 19 of the Finance Act, 1936, . . . a company to which "the provisions of the said section 21 do not apply."

On April 6, 1948, the issued share capital of a company, company A., consisted of a class of A ordinary shares and a class of B ordinary shares. All the shares carried one vote each except for one of the B ordinary shares, the "management share," which carried a number of votes equal to three times the total number of votes of all the other shares of both classes. Company B. and company C. each owned five-twelfths of the issued shares of each class, and the remaining two-twelfths were owned by company D. The management share and one other B ordinary share were owned beneficially by company B. and company C. jointly, the name of company B. appearing first on the register of members in respect of them. Article 78 of the articles of association of company A. provided that, where there were joint registered holders, any one of them might vote as if he were solely entitled, and if more than one holder were present at a meeting the one whose name appeared first on the register should alone be entitled to vote. It was admitted that company B. was a company to which section 21 of the Finance Act, 1922, applied and that company C. was not. It was disputed whether or not section 21 applied to company D.

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[1] See now the Income Tax Act, 1952, ss. 245, 256.

Directions were made against company A. under section 21 of the Finance Act, 1922, for the years 1948–49, 1949–50 and 1950–51. The company appealed and the Special Commissioners discharged the directions. On an appeal by the Crown:—

Held, (1) that ordinarily "control" in relation to a company meant the power by the exercise of voting rights to carry a resolution at a general meeting of the company; and, in the absence of any indication to the contrary in the context in which the word was found, the persons who possessed those voting rights were to be ascertained by reference to the articles of the company and its register of members, but that the words "by reason of the beneficial "ownership of shares" in section 21 (6) as amended provided such an indication to the contrary, and "control" in that subsection was related to beneficial ownership; so that, although company B. had exclusive control of company A. in the ordinary sense of the word by reason of its name being first on the register in respect of the management share, it did not have that control by reason of its beneficial ownership of the management share which it held jointly, and did not, therefore, have exclusive control within section 21 (6) (see post, p. 578).

British American Tobacco Co. Ltd. v. *Inland Revenue Commissioners* [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13, H.L.; *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.* [1945] W.N. 117; 61 T.L.R. 430; [1945] 1 All E.R. 667, H.L.; *Barclays Bank Ltd.* v. *Inland Revenue Commissioners* [1959] Ch. 659; [1959] 3 W.L.R. 240; [1959] 3 All E.R. 140, C.A. considered.

(2) That the requirements of section 21 (6) were satisfied and a company was a "subsidiary company" within the meaning of the section if upon any one commutation of members the control of the company was in the hands of two or more companies to none of which section 21 applied, and that the joint holders of the management share did not together have exclusive control of company A., because either of them could, by taking appropriate steps, disfranchise the management share, in which case the votes attached

to the remaining shares would alone be effective. Therefore, disregarding the management share, any two members of company A. could control it if they acted in concert, and, upon one commutation, the control of company A. was in the hands of company C. and company D. by reason of their beneficial ownership of shares in company A. (post, pp. 579, 580).

(3) But that under the overriding provision of section 14 (1) of the Finance Act, 1937, a company under the control of not more than five persons within the meaning of section 19 (1) (*a*) was disqualified from the status of a subsidiary company if it was under the control of not more than five persons taking into account only companies to which section 21 did apply; that "control" in section 19 (1) of the Act of 1936 was used in the ordinary sense of the word and was not related to beneficial ownership of shares; and that, therefore, company B., being the first registered holder of the management share, had exclusive control of company A. within the meaning of section 19 (1) (*a*), and company A. was excluded from the status of a subsidiary company (post, p. 580). Accordingly, section 21 of the Act of 1922 applied and the directions should be restored.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent company, Harton Coal Co. Ltd., appealed to the special commissioners against directions made by the assessing special commissioners under section 21 of the Finance Act, 1922, for the years 1948–49, 1949–50 and 1950–51, on the ground that it was not a subsidiary company within the meaning of section 21 (6) of the Finance Act, 1922 (as amended).

The following facts were found by the special commissioners: The company was incorporated on August 6, 1885, and carried on a colliery business until January 1, 1947, when the whole of its undertaking vested in the National Coal Board. From that date until July 29, 1952, when it went into voluntary liquidation, its activities were confined to collecting interim income and interim payments from the National Coal Board and to paying off debentures from the moneys so received. At all material times the chairman of the company was chairman of the directors of Stephenson Clarke Ltd. On April 6, 1948, the issued share capital of the company consisted of 963,250 A ordinary shares of 10s. each and 75,000 B ordinary shares of 10s. each. At that date the "Schroder Group" held 401,355 A shares and 31,250 B shares, which together equalled five-twelfths of the total stock issued; the "Stephenson Clarke Group" had an identical holding and thus also held five-twelfths of the total issued stock; and British Industrial Corporation Ltd. [hereinafter called "B.I.C."]

through nominees held 160,540 A shares and 12,500 B shares, which accounted for the remaining two-twelfths of the total stock issued. Certain immaterial changes in the shareholding occurred between April 6, 1948, and July 29, 1952, within the "Schroder "Group" and the "Stephenson Clarke Group."

Of the "Schroder Group" shareholding the 401,355 A shares and 8,719 of the B shares of the company were held in the name of Schroder Nominees Ltd. [hereinafter called "Schroder"] and it was admitted on behalf of the company that Schroder was a company within the provisions of section 21. On the other hand, it was admitted on behalf of the appellants that Stephenson Clarke Ltd. [hereinafter called "Stephenson"] was a company which did not come within the provisions of section 21.

All the A and B shares of the respondent company had equal voting rights, except one. By virtue of a special resolution of March 23, 1932, the holder for the time being of the B ordinary share numbered 1,000,001 was entitled to cast a number of votes equal to three times the total number of votes of all other shareholders of both classes. Thereafter, the management share, numbered 1,000,001, was held jointly by Schroder and Stephenson, and another B share which had only the ordinary voting right was allotted with it to balance the holdings. On February 4, 1928, these two shares were transferred into the names of Schroder and Stephenson jointly, and had so remained on the register in that order since that date. Although Schroder was the first-named holder in the register of the management share, the share was beneficially owned by both Schroder and Stephenson.

B.I.C., the third member of the respondent company, with two-twelfths shareholding, was a company incorporated on April 5, 1919, with an issued capital at the material time of £200,000 preferred ordinary stock and £87,900 ordinary stock. This stock was the subject of dealings and was quoted on the official list of the Stock Exchange. The voting powers were one vote for every complete £1 in nominal amount of holding of preferred ordinary stock and one vote for every complete £1 in nominal amount of holding of ordinary stock. It was admitted that the shareholders of B.I.C. on April 6, 1949, with one possible exception, had acquired their shares on the Stock Exchange. This one exception was represented by a large holding by the Midland Bank (Threadneedle Street) Nominees Ltd. of £480 preferred ordinary and £43,852 ordinary stock held on behalf of the executors of the estate of a former director of B.I.C. B.I.C. had a large number of shareholders, and there were, therefore, a number of possible combinations of not more than five shareholders who could control B.I.C. if they acted in concert. Certain of these combinations resulted in the public (i.e., shareholders other than the controlling shareholders) holding ordinary stock (not being shares entitled to a fixed rate of dividend) carrying not less than 25 per cent. of the total voting power, and other combinations resulted in the public holding ordinary stock carrying less than 25 per cent. of the total voting power.

By article 78 of the articles of the respondent company (attached to and forming part of the case stated): "Where there "are joint registered holders of any share, any one of such persons "may vote at any meeting, either personally or by proxy, in "respect of such share as if he were solely entitled thereto; and if "more than one of such joint holders be present at any meeting, "personally or by proxy, that one of the said persons so present "whose name stands first on the register in respect of such shares "shall alone be entitled to vote in respect thereof."

It was contended on behalf of the Crown that by virtue of its status as the first-named holder in the register of the management share of the respondent company, Schroder controlled the company; that on a proper construction of section 21 (6) of the Finance Act, 1922, as amended by section 31 (3) of the Finance Act, 1927, and section 14 (1) of the Finance Act, 1937, the respondent company was under the control of a company (Schroder), which was a company to which the provisions of section 21 applied and was not therefore a subsidiary company within the meaning of section 21 (6); alternatively that, if consideration of the position of B.I.C. were necessary, then B.I.C. was a company which was under the control of not more than five persons, and which was not a subsidiary company, and was not a company in which the public was substantially interested within section 21 (6) of the Finance Act, 1922; that on that footing the respondent company was under the control of Schroder and B.I.C., both being companies to which the provisions of section 21 applied, even if, which was denied, the management share jointly owned by Schroder and Stephenson fell to be ignored; and that, in either event, the directions for the years 1948–49, 1949–50 and 1950–51 ought to be confirmed.

It was contended on behalf of the respondent company that on a proper construction of section 21 (6), as amended, the company was not under the control of Schroder, because the beneficial ownership of the management share was jointly held by Schroder and Stephenson and no control could be exercised by its means unless the wills of the joint owners concurred; that B.I.C. was not a company within the control of not more than five persons, but was a company in which the public were substantially interested because it was possible to find persons holding 25 per cent. of the ordinary votes who were, within the meaning of section 21 (6), as amended, members of the public; that B.I.C. was therefore a company to which the provisions of section 21 of the Finance Act, 1922, did not apply; that the respondent company was a subsidiary company, to which the provisions of section 21 did not apply, because the control was in the hands of Stephenson and B.I.C., neither of which was a company to which the provisions of section 21 applied; and that the directions for the years 1948–49, 1949–50 and 1950–51 ought to be discharged.

The commissioners discharged the directions and the Crown appealed.

Sir Frank Soskice Q.C., *E. Blanshard Stamp* and *Alan S. Orr* for the Crown. If a company is to be a subsidiary company within section 21 (6) of the Finance Act, 1922, control must be in the hands of a company or companies to which section 21 does not apply. Section 21 (6) relates control to the "beneficial "ownership of shares." To determine who, by reason of the beneficial ownership of shares, controls a company, one must look at the way in which the shares are owned and determine what is the consequence of such beneficial ownership. The articles of a company delimit the rights of the shareholders. In the present case, the management share was vested in Schroder and Stephenson upon the terms that they enjoyed all the rights and advantages of the share equally, except that one had to appear first on the register and that one (Schroder) was entitled to decide how the votes attached to the share were to be cast. Those consequences flow from the beneficial ownership of the share. If there had been a dispute between Schroder and Stephenson as to how the vote was to be cast, the will of Schroder would have prevailed. Stephenson could not have prevented Schroder exercising the voting rights attached to the management share because joint tenants do not hold their shares on trust for each other. Therefore, Schroder controlled the company.

In the alternative, control was in the hands of Schroder and Stephenson by reason of their beneficial ownership of the management share. The commissioners decided that the management share was to be disregarded because its voting rights could only be exercised if Schroder and Stephenson were in agreement. That view is not correct. Section 21 (6) contemplates the situation in which two or more companies exercise control, and, as a matter of logic, it is impossible to have a situation in which control is vested in more than one company unless it is assumed that those companies act in unison.

There is a difference between the control envisaged by section 21 (6) and by section 19 (1) of the Finance Act, 1936. There is no reference to beneficial ownership in section 19 (1). It has been held that the question whether a shareholder has a " controlling " interest " under a statutory provision which did not refer to beneficial ownership depended merely upon the shareholder's power to bring it about that the majority of the votes were cast in accordance with his wishes (*British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* [2] and *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[3]); and that, in ascertaining whether a shareholder had such power, one did not look beyond the register: *Barclays Bank Ltd.* v. *Inland Revenue Commissioners*.[4] There is no distinction between " controlling interest " and " control."

Section 14 of the Finance Act, 1937, requires that, before a company can be a subsidiary company, it must be under the control of not more than five persons and that, to bring it under such control, it must be necessary to include a non-section 21 company among the controllers. Is it necessary, in the present case, in order to arrive at the conclusion that the company was controlled by not more than five persons, to include among the controllers a non-section 21 company? " Control " in section 14 has the same meaning as in section 19 (1) and is not, therefore, related to beneficial ownership of shares, so that Schroder controls the company within the meaning of section 14 by reason of its right to cast the votes attached to the management share. If, for any reason, it is wrong to say that Schroder controls the company, Schroder and B.I.C. control it. It is submitted that B.I.C. is a section 21 company and, therefore, it is still unnecessary to include a non-section 21 company among the controllers.

The next limb of the Crown's argument proceeds on the hypothesis that the management share must be disregarded in ascertaining who controls the company within section 21 (6). On that hypothesis, five-twelfths of the shares were vested in each of Schroder and Stephenson and two-twelfths in B.I.C., so that if any two of the three shareholders combined they could have controlled the company. The question arises, therefore, how are the controllers to be chosen? It is submitted that it is neither for the taxpayer nor for the Crown to choose the controllers but that they should be ascertained by an objective test—was control in the hands of a non-section 21 company or companies? If the objective test can be answered in the negative the company cannot be a subsidiary company. It is enough to prevent the company from being a subsidiary company if one true answer is in the negative even if it is also possible to answer the test in the affirmative. In the present case, the test can be answered in the negative because control is in the hands of Schroder and Stephenson or of Schroder and B.I.C. and, therefore, the company cannot be a subsidiary company.

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[2] [1943] A.C. 335.

[3] [1945] W.N. 117.

[4] [1959] Ch. 659.

The Crown makes two subsidiary contentions on this branch of the case. In the first place, the company is trying to avail itself of an exception and it is, therefore, for it to satisfy the court that the exception applies to it. Secondly, there are three possible combinations each of which could control the company—(i) Schroder and Stephenson who together owned ten-twelfths of the shares, (ii) Schroder and B.I.C. who together owned seven-twelfths, and (iii) Stephenson and B.I.C. who together also owned seven-twelfths. If it is correct to say that, when considering whether control is in the hands of more than one company, one must assume a concurrence between those companies, then assuming the two companies in each of the three groups are in concurrence control must lie in Schroder and Stephenson for their combination has a preponderance of votes over either of the other combinations.

Even if the right view is that Stephenson and B.I.C. control the company, that does not assist it unless B.I.C. is a non-section 21 company. The only way in which B.I.C. could be a non-section 21 company is if it is a company in which the public are substantially interested within section 21 (6) as amended by section 31 (3) of the Finance Act, 1927.[5] The preferred ordinary shares in B.I.C. must be disregarded because they are entitled to a fixed rate of interest. In ascertaining whether 25 per cent. of the voting power is in the hands of the public, the five or fewer shareholders who are the controllers must be disregarded so that the "public" means the shareholders other than the controllers: *Tatem Steam Navigation Co. Ltd.* v. *Inland Revenue Commissioners* [6] and *Commissioner of Income Tax* v. *Bjordal.*[7] In each of those cases, one shareholder held more than 50 per cent. of the shares and was, therefore, the controller. In the case of B.I.C. no one shareholder could control it, but there were four combinations each of which could do so. Two of these combinations produced the result that less than 25 per cent. of the voting power was in the hands of the public and the other two produced the result that more than 25 per cent. was in the hands of the public. There is no authority on this point, but it is submitted that if it is possible to answer the question whether not less than 25 per cent. of the voting power is in the hands of the public in the negative, B.I.C. is not a company in which the public are substantially interested and is, therefore, a section 21 company. Here again, the company is trying to rely on an exception. It is, therefore, for the company to establish that not less than 25 per cent. of the voting power is in the hands of the public, and it has failed to do so if it is possible to say that it is not.

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[5] Finance Act, 1927, s. 31 (3): "A "company shall be deemed to be a "company in which the public are "substantially interested if shares of "the company (not being shares en- "titled to a fixed rate of dividend, "whether with or without a further "right to participate in profits) carry- "ing not less than twenty-five per "cent. of the voting power have been "allotted unconditionally to, or ac- "quired unconditionally by, and are "at the end of the year or other period "for which the accounts of the com- "pany have been made up as afore- "said beneficially held by, the public

Blanshard Stamp followed.

F. Heyworth Talbot Q.C. and *C. N. Beattie* for the company. It is only by considering the steps in the development of the law as they occurred that the language of the sections can be construed correctly. Section 21 (6) as originally drawn contained no reference to subsidiary companies and made no provision for sub-apportionment in the case of inter-related companies. Section 32 of the Finance Act, 1927, provided for sub-apportionment, and section 31 (3) introduced the exemption of subsidiary companies and public companies. The scheme as it then stood seems to have worked satisfactorily with regard to inter-related companies; but it was possible for the controller of a company to avoid surtax directions by transferring his shares to a public company while retaining an option to re-acquire the shares.

"(not including a company to which "the provisions of this section apply) "and any such shares have in the "course of such year or other period "been the subject of dealings on a "stock exchange in the United Kingdom and the shares have been quoted "in the official list of such a stock "exchange."

[6] [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616, C.A.

[7] [1955] A.C. 309; [1955] 2 W.L.R. 342; [1955] 1 All E.R. 401, P.C.

Section 19 (1) of the Finance Act, 1936, enacted that anyone who was entitled to acquire control of a company was to be deemed to control it. Section 19 did not substitute a new definition of control for that contained in section 21 (6). It added to the existing definition but left it in operation. After 1936 there were, therefore, two types of control—actual control under section 21 (6) and deemed control under section 19 (1). Section 19 was effective in certain cases, but a company was still a subsidiary company if its shares were held by a public company on terms that an individual could obtain control provided that the beneficial ownership of the shares was in the public company. Section 14 was passed to remedy this defect in section 19 (1) and, therefore, section 14 applies only to artificial or deemed control under section 19 and not to actual control. This construction of section 14 is supported by the reference to section 19 in section 14 itself. The present case is one of actual control and, therefore, section 14 is irrelevant.

Any power Schroder had to exercise the voting rights attaching to the management share was by virtue of the legal and not the beneficial ownership of the share. That does not satisfy the requirements of section 21 (6) and, therefore, if section 14 does not apply, the commissioners were right in saying that the management share must be disregarded. There are, therefore, various situations in which different shareholders could control the company if they were in agreement. Section 21 (6) imposes a positive test—can control be in the hands of one or more non-section 21 companies? Assuming that B.I.C. is a non-section 21 company, the question is whether Stephenson and B.I.C. could, by the exercise of the voting rights incident to the shares in their beneficial ownership, have enforced their will in any matter in which they were in agreement notwithstanding that Schroder was opposed to them. Ignoring the management share, there can be no doubt that they could. Between them they owned seven-twelfths of the shares while Schroder only owned five-twelfths.

If it is wrong to say that section 14 has nothing to do with this case, it is necessary to see whether, under section 19 (1) (*a*), Schroder had control. The power of Schroder to cast the votes attaching to the management share was a fiduciary power because of the joint ownership of the share. If Schroder had used the voting rights against the wishes of Stephenson and, as a result, a resolution had been passed, Stephenson could have got that resolution set aside by the court. It is absurd to say that merely because Schroder was in a position to secure the passing of a resolution which was capable of being rescinded, it controlled the company. Further, the chairman of the company was, at all material times, the chairman of Stephenson. If Schroder had attempted to use the voting rights attaching to the management share in a manner contrary to the wishes of Stephenson, he would have refused to accept the vote; and, if Schroder had taken proceedings to compel him to accept it, Stephenson would have taken proceedings against Schroder for its improper use of its fiduciary power.

In the *Bibby* case [8] the expression was "controlling interest," which is different from "control," the expression used in section 19 (1). Further, "controlling interest" was being used in a different context, i.e., in relation to profits tax. In the present case attention is paid to beneficial ownership throughout the code of legislation on this subject. The *Bibby* case [8] is, therefore, distinguishable.

It is submitted that B.I.C. is a company in which the public is substantially interested within section 21 (6) as amended. The public are the shareholders other than the controllers. It is agreed that the "public" should be ascertained by an objective test, but, if the correct view is that the controllers should be chosen by either the Crown or the subject, the subject is the person who should make the choice. It may be that the most logical way of applying the rule in *Tatem Steam Navigation Co. Ltd.* v. *Inland Revenue Commissioners* [9] to a case where there are several possible combinations of controllers is to say that all the shareholders are the public except those shareholders who must be included in any combination of controllers. It is submitted, however, that the requirements of the section are satisfied if it is possible to find at least one combination of controllers which leaves not less than 25 per cent. of the total voting power of the company in the hands of the public. In the present case, there are two such combinations and, therefore, B.I.C. is a company in which the public are substantially interested.

In the result, therefore, Stephenson and B.I.C. controlled the company and neither of them is a section 21 company so that the company is a subsidiary company.

Beattie followed.

Sir Frank Soskice Q.C. in reply. The company contends that section 14 only applies to deemed control and that, as the present is a case of actual control within section 21 (6), section 14 does not apply to it. However, although the company comes within section 21 (6) it also comes within section 19 (1) (*a*), to which section 14 admittedly applies. Alternatively, there is only one definition of control, for the word "deemed" in section 19 (1) is intended to produce the result that "control" in section 21 (6) is defined by section 19 (1) (see as to "deemed," *St. Aubyn* v. *Attorney-General* [10]); and, therefore, there is no such restriction on the operation of section 14 as the company contends.

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[8] [1945] W.N. 117.

[9] [1941] 2 K.B. 194.

Cur. adv. vult.

June 3. PENNYCUICK J. read the following judgment: This is an appeal by the Commissioners of Inland Revenue against a determination of the special commissioners whereby they discharged directions made upon the respondent company under section 21 of the Finance Act, 1922, for the years 1948–49, 1949–50 and 1950–51. The sole question arising upon the appeal is whether the company was during these years a subsidiary company within the meaning of section 21. [His Lordship stated the facts and continued:] I now read the statutory provisions as they stood in the years under appeal. The Finance Act, 1922, s. 21 (1), as amended: "With a view to preventing the avoidance of the "payment of super-tax through the withholding from distribution "of income of a company which would otherwise be distributed, "it is hereby enacted as follows: (1) Where it appears to the "special commissioners that any company to which this section "applies has not, within a reasonable time after the end of any "year or other period ending on any date subsequent to the fifth "day of April, nineteen hundred and twenty-two, for which "accounts have been made up, distributed to its members in such "manner as to render the amount distributed liable to be included "in the statements to be made by the members of the company "of their total income for the purposes of super-tax, a reasonable "part of its actual income from all sources for the said year or "other period, the commissioners may, by notice in writing to "the company, direct that for purposes of assessment to super-"tax, the said income of the company shall, for the year or other "period specified in the notice, be deemed to be the income of the "members." Subsection (6): "This section shall apply to any "company which is under the control of not more than five "persons and which is not a subsidiary company or a company

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[10] [1952] A.C. 15; [1951] 2 All E.R. 473, H.L.

" in which the public are substantially interested. For the purpose of this subsection—A company shall be deemed to be a " subsidiary company if by reason of the beneficial ownership of " shares therein the control of the company is in the hands of a " company not being a company to which the provisions of this " section apply, or of two or more companies none of which is a " company to which those provisions apply; A company shall be " deemed to be a company in which the public are substantially " interested if shares of the company (not being shares entitled " to a fixed rate of dividend, whether with or without a further " right to participate in profits) carrying not less than twenty-five " per cent. of the voting power have been allotted unconditionally " to, or acquired unconditionally by, and are at the end of the " year or other period for which the accounts of the company " have been made up as aforesaid beneficially held by, the public " (not including a company to which the provisions of this section " apply) and any such shares have in the course of such year or " other period been the subject of dealings on a stock exchange " in the United Kingdom and the shares have been quoted in the " official list of such a stock exchange."

The Finance Act, 1936, s. 19 (1): " For the purposes of subsection (6) of section twenty-one of the Finance Act, 1922, a " company shall be deemed to be under the control of not more " than five persons—(*a*) if any five or fewer persons together " exercise, or are able to exercise, or are entitled to acquire, " control, whether direct or indirect, over the company's affairs, " and in particular, but without prejudice to the generality of the " foregoing words, if any five or fewer persons together possess, " or are entitled to acquire, the greater part of the share capital " or voting power of the company." Then follow two alternative paragraphs, (*b*) and (*c*), which I need not read.

The Finance Act, 1937, s. 14 (1): " Notwithstanding anything " in subsection (6) of section twenty-one of the Finance Act, 1922, " a company which is deemed for the purposes of that subsection " to be under the control of not more than five persons shall not " be deemed to be a subsidiary company, unless it can be deemed " to be under the control of not more than five persons only by " including among the persons mentioned in paragraph (*a*), (*b*) " or (*c*) of subsection (1) of section nineteen of the Finance Act, " 1936, or in subsection (3) of section twenty of that Act, a " company to which the provisions of the said section twenty-one " do not apply and which is not the nominee of any other person."

These provisions are now re-enacted in section 245 and section

256 of the Income Tax Act, 1952, where they can conveniently be looked at together. [His Lordship read the contentions of the parties before the commissioners and continued:] The commissioners delivered their determination in writing in the following terms: "(1) Before we approach the main question in the appeal "we have first to determine whether British Industrial Corpora-"tion Ltd. ('B.I.C.') is a company to which section 21 of the "Finance Act, 1922, applies. It is manifestly under the control "of not more than five persons, since there are a number of "combinations of shareholders whose votes added together make "up more than 50 per cent. of the total votes: it is therefore "true to say that 'any five or fewer persons together exercise, "'or are able to exercise . . . control . . . over the company's "'affairs . . .' (section 19 (1) (*a*) of the Finance Act, 1936). "It is, however, contended that B.I.C. is a 'company in which "'the public are substantially interested' and is therefore "excluded (section 21 (6) as amended). This depends upon "whether 25 per cent. of the voting power of the ordinary shares "is in the hands of 'the public.' The case of *Tatem Steam* "*Navigation Co. Ltd.* v. *Commissioners of Inland Revenue*[1] "(which is, of course, binding upon us), indicates in our view that "'the public' is to be construed as all persons other than those "persons or persons and their relatives and nominees who are to "be taken as the 'controllers' bringing the company within "section 21. Upon a careful examination of the list of share-"holders in B.I.C. it becomes apparent that the holding of 'the "'public' is not capable of exact and certain estimation: it "depends upon the selection of the 'controllers.' The Crown "can so select 'controllers' that 'the public' has less than 25 "per cent., but the appellant company's advisers can so select "'controllers' that 'the public' has over 25 per cent. Which "selection are we to prefer? It seems to us that the answer is "to be found in the words of section 21 (6): A company is entitled "to claim exclusion from the application of that subsection if a "certain condition is fulfilled, namely, if persons can be found "holding 25 per cent. of the ordinary votes who are not 'control-"'lers,' such 'controllers' being other shareholders to a number "not exceeding five whose voting power derived from all classes "of shares exceeds 50 per cent. In the case of B.I.C. that "condition can be fulfilled, and we consider that it is therefore "entitled to be excluded from the operation of section 21: the

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[1] [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616, C.A.

"terms of an exemption are to be given full weight. (2) If, as "we have found, B.I.C. is not within section 21, then in our "opinion it follows that the appellant company is a 'subsidiary' "company within section 21 (6) as amended, since by reason of "the beneficial ownership of its shares the control of it is in the "hands of two companies (B.I.C. and Stephenson Clarke Ltd.), "neither of which is within section 21. It is of course true that "the Schroder Group and Stephenson Clarke Ltd. together, or "the Schroder Group and B.I.C. together, can also control the "appellant company, and therefore the control of the company "would not in that case be in the hands of two non-section 21 "companies: but for the reasons given in the last preceding para- "graph we consider that circumstance immaterial: the words of "an exemption are fulfilled and the exemption should be given. "(3) It remains to notice an argument on behalf of the Crown "founded on the existence of the management share held jointly "by Stephenson and Schroder. It is said that Schroder is in "sole control because the name of its nominee stands first and "therefore he can exercise voting power on behalf of Schroder "even if Stephenson disagrees. If that is so, it is said, the "appellant company cannot be a subsidiary because of the provi- "sions of section 14 of the Finance Act, 1937. We cannot accept "this contention. Control is throughout this legislation related "to beneficial ownership (it would make nonsense of it if it were "otherwise); the beneficial ownership of the management share "is joint, and no control can be exercised by its means unless the "wills of the joint owners concur. Schroder cannot, therefore, "in our opinion, be said to control alone by means of the manage- "ment share. (4) We therefore discharge the directions." It will be observed that the issue is purely one of law.

I have had the advantage of full and lucid arguments by Sir Frank Soskice on behalf of the Commissioners of Inland Revenue and Mr. Heyworth Talbot on behalf of the company. These arguments have followed rather a different course from those presented before the commissioners, and the issue may now be stated in the form of the following three questions: (1) Was the control of the company in the hands of Stephenson and B.I.C. by reason of their beneficial ownership of shares in the company? (It is clear that the control was not in any sense in the hands of Stephenson or B.I.C. alone.) (2) Is the company excluded from the status of a subsidiary company by section 14 (1) of the Finance Act, 1937? (3) Is B.I.C. a company to which section 21 applies?

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Pennycuick J.

In order to rescind the directions, the company must show that question (1) should be answered in the affirmative, question (2) in the negative and question (3) in the negative. I will endeavour to deal with these questions in the same order.

(1) Was the control of the company in the hands of Stephenson and B.I.C. by reason of their beneficial ownership of shares in the company? This question raises three distinct points: (a) was the control of the company exclusively in the hands of Schroder for the purpose of section 21 (6) by reason of its interest in the management share? If so, obviously the control of the company was not in the hands of Stephenson and B.I.C. It is established that the expression "control" in relation to a company means the power by the exercise of voting rights to carry a resolution at a general meeting of the company. It is also established that in the absence of an indication to the contrary in the context in which the word occurs, the persons who possess those voting rights are to be ascertained by reference to the articles of the company and its register of members: see as to those points *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners* [2]; *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[3]; *Barclays Bank Ltd.* v. *Inland Revenue Commissioners.*[4] It appears from these cases that there is for the present purpose no relevant distinction between the expressions "control" and "controlling "interest." It is also established, always in the absence of an indication to the contrary in the context, that where there are joint holders of a share and the articles of the company contain a provision corresponding to article 78 here, the first registered holder alone is to be taken into account in the ascertainment of voting rights: see *Barclays Bank Ltd.* v. *Inland Revenue Commissioners.*[4] But in my judgment the position is radically altered by the presence in subsection (6) of section 21 of the words "by "reason of the beneficial ownership of shares therein." The management share belonged beneficially to Schroder and Stephenson jointly, and this joint beneficial ownership gave them joint control in the sense that acting together they could, by taking the appropriate steps, have exercised majority voting rights. But it seems to me impossible to say that Schroder had any beneficial interest in the management share which could be said to give Schroder control to the exclusion of Stephenson. Schroder had

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[2] [1943] A.C. 335; 59 T.L.R. 91; [1943] 1 All E.R. 13, H.L.

[3] [1945] W.N. 117; 61 T.L.R. 430; [1945] 1 All E.R. 667, H.L.

[4] [1959] Ch. 659; [1959] 3 W.L.R. 240; [1959] 3 All E.R. 140, C.A.

exclusive control in the sense explained above not by reason of its beneficial interest, but by reason of the fact that its name was first on the register of members.

(b) Was the control of the company exclusively in the hands of Schroder and Stephenson for the purpose of section 21 (6) by reason of their joint beneficial ownership of the management share? If so, again obviously the control of the company was not in the hands of Stephenson and B.I.C. It is clear that as beneficial owners of the management share, Schroder and Stevenson could together have exercised their votes so as to carry a resolution at a general meeting of the company. But it is also clear that Stephenson, if it had not been in agreement with Schroder, could by taking appropriate steps as joint beneficial owner have disfranchised the management share and, on this footing, the votes attached to the remaining ordinary shares would alone have been effective. I think, therefore, the beneficial owners of the management share cannot be said to have had exclusive control of the company.

The point may be illustrated by a rather different example. Suppose a company with 1,000 shares, 600 of which are held by A in trust for B and C jointly, and 400 by C alone beneficially: obviously B and C together control the company by reason of the beneficial ownership of shares; but does not C also alone control by reason of the beneficial ownership of shares? It seems to me he does.

(c) Disregarding the management share, was the control of the company in Stephenson and B.I.C. by reason of their respective beneficial ownership of 5/12ths and 2/12ths of the ordinary shares? It is clear that Schroder and either Stephenson or B.I.C. together could have exercised their votes so as to carry a resolution at a general meeting of the company, and that the control of the company was for this reason in the hands either of Schroder and Stephenson or of Schroder and B.I.C. But it is equally clear that Stephenson and B.I.C. together could have exercised their votes so as to carry a resolution, and it follows that if the control of the company was in the hands of Schroder together with Stephenson or B.I.C., it must also have been in the hands of Stephenson with B.I.C. This is quite a common position; that is to say, one can find a number of commutations of members who together have majority voting rights.

It seems to me that the requirements of subsection (6) should be treated as satisfied if upon any one commutation the control of the company is in the hands of two or more companies, to none of which section 21 applies.

Sir Frank contends that the requirements of the subsection are not satisfied if upon any one commutation the control is in the hands of two or more companies to one of which section 21 does apply. But I think such an intention would probably be expressed in different language and that the subsection ought not to be so construed.

It follows, in my judgment, that question (1) of the three questions stated above should be answered in the affirmative.

(2) Is the company excluded from the status of a subsidiary company by section 14 (1) of the Finance Act, 1937? It will be observed that this subsection is an overriding provision prefaced by the words "Notwithstanding anything in subsection (6) of "section 21." It is common ground that the effect of the rather contorted language of section 14 (1) is that a company under the control of not more than five persons is absolutely disqualified from the status of a subsidiary company unless it is only by the inclusion of a company to which section 21 does not apply that the company can be brought within the ambit of one of the three paragraphs of section 19 (1). Putting it another way, the disqualification operates if, taking into account only companies to which section 21 does apply individually, the company comes within the ambit of one of those paragraphs. There is no reference in the subsection to beneficial ownership, and such a reference cannot, I think, be implied.

Applying this provision—that is, section 14 (1)—in relation to paragraph (*a*) in section 19 (1) of the Finance Act, 1936, which is the relevant paragraph, it appears to me squarely to disqualify the company here. Schroder, as the first registered holder of the management share, controls the company alone in the ordinary sense of the word and within the express terms of the deeming provision in section 19 (1) (*a*); that is to say, Schroder is able to exercise control over the company's affairs and, in particular, possesses the greater part of the voting power of the company: see the cases referred to above.[5] Schroder is a company to which section 21 applies. The company, accordingly, falls within the ambit of paragraph (*a*), taking into account only a company to which section 21 applies and without having to include a company to which section 21 does not apply.

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[5] [1943] A.C. 335; [1945] W.N. 117; [1959] Ch. 659.

Mr. Heyworth Talbot, in a survey of the successive statutory provisions, has sought to put some limitation upon the scope of section 14 (1) of the 1937 Act in relation to section 19 (1) of the 1936 Act; but it seems to me that section 14 (1) contains no such limitation and that none can be implied.

It is on this point that I differ from the commissioners. The defect in their reasoning, as it seems to me, lies in the sentence in paragraph (3) of their determination, " Control is throughout this " legislation related to beneficial ownership." Mr. Heyworth Talbot has not attempted to support this proposition. This may seem a harsh and technical result, but I can find no sufficient ground upon which the case can be distinguished from the decisions cited above. If this view is correct, the case is concluded in favour of the Commissioners of Inland Revenue.

(3) Is B.I.C. a company to which section 21 applies? B.I.C. is admittedly a company under the control of not more than five persons and is not a subsidiary company; but the company contends that B.I.C. is a company in which the public are substantially interested within the definition in subsection (6) of section 21. It is settled that for the purpose of this definition the expression " the public " excludes those members who control the company: see *Tatem Steam Navigation Co. Ltd.* v. *Inland Revenue Commissioners*[6] and *Commissioner of Income Tax* v. *Bjordal.*[7] This is a simple matter where a single member holds a majority of the shares, but where the shareholding is widely spread there may be a large number of possible permutations of controlling members; for example, if there are nine members holding the shares in equal proportions, every combination of five members has control. There is thus a great and obvious difficulty in deciding which members shall be treated as the controlling members and which the public.

In the case of B.I.C., upon certain permutations, the public held ordinary shares of the company carrying not less than 25 per cent. of the total voting power, and upon other permutations the public held ordinary shares carrying less than 25 per cent. of the total voting power. This being the position, does B.I.C. fall within the definition? I have thought it right to state this problem, but upon the view which I have taken above, the question does not arise and I think it would be undesirable for me

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[6] [1941] 2 K.B. 194; 57 T.L.R. 622; [1941] 2 All E.R. 616, C.A.

[7] [1955] A.C. 309; [1955] 2 W.L.R. 342; [1955] 1 All E.R. 401, P.C.

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to express obiter a view upon what may be a point of some general importance. I therefore refrain from doing so.

In the result, this appeal succeeds.

Appeal allowed with costs.

Solicitors: *Inland Revenue Solicitor; Slaughter & May.*

V. A. M.

1960
May 5.

Buckley J.

In re STRAND AND SAVOY PROPERTIES LTD. D. P. DEVELOPMENT CO. LTD. *v.* CUMBRAE PROPERTIES LTD.

[1959 S. 3024.]

Landlord and Tenant—Option to renew lease—Exercisable more than 21 *years from date of lease—Whether valid—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 149 (3).

By a lease dated November 1, 1928, certain property was demised for a term of 35 years from June 24, 1926, upon certain terms and conditions, including, inter alia, the following provision: "The "lessors will at the written request of the lessee made 12 months "before the expiration of the term hereby created . . . at the "expense of the lessee grant to him a lease of the demised premises "for the further term of 35 years from the expiration of the said "term hereby granted at the same rent and containing the like "covenants and provisions as are herein contained with the exception of the present provision for renewal the lessee on the execution "of such renewed lease to execute a counterpart thereof."

On October 15, 1953, the tenants gave written notice to the landlords of their wish to take up that option for renewal and on November 18, 1953, the landlords notified the tenants that they were advised that the option was void by reason of section 149 (3) [1] of the Law of Property Act, 1925.

On a summons taken out by the tenants to determine, inter alia, whether, on the true construction of section 149 (3), the provision for renewal was valid or void:—

Held, that, on its true construction, section 149 (3) of the Law of Property Act, 1925, was not primarily intended to deal with renewals of leases, but, in so far as it applied to contracts, was confined to, and only rendered void, contracts to grant leases which, when created, would be reversionary leases, the postponement of the commencement of the term being for more than 21 years from the date of the lease, and did not invalidate a contract to create a lease at however remote a date in the future, which, when granted, would create a term taking effect within 21 years of the date of that lease. Accordingly, the provision for renewal contained in the lease in question was valid.

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[1] Law of Property Act, 1925, s. 149: "(3) A term, at a rent or "granted in consideration of a fine, "limited after the commencement of "this Act to take effect more than "21 years from the date of the instrument purporting to create it shall "be void, and any contract made "after such commencement to create "such a term shall likewise be "void . . ."

Northchurch Estates Ltd. v. *Daniels* [1947] Ch. 117; 62 T.L.R. 669; [1946] 2 All E.R. 524 considered.

Adjourned summons.

By a lease dated November 1, 1928, made between the Strand and Savoy Properties Ltd., of the one part, and Louis Francois Peyrecave, of the second part, the parties of the first part demised certain property in the Strand for a term of 35 years from June 24, 1926, on certain terms and conditions, including a provision contained in paragraph 6 of the sixth schedule to the lease in the following terms: "The lessors will at the written request "of the lessee made 12 months before the expiration of the "term hereby created and if there shall not at the time of such "request be any existing breach or non-observance of any of the "covenants on the part of the lessee hereinbefore contained at "the expense of the lessee grant to him a lease of the demised "premises for the further term of 35 years from the expiration "of the said term hereby granted at the same rent and containing "the like covenants and provisions as are herein contained with "the exception of the present provision for renewal the lessee "on the execution of such renewed lease to execute a counterpart "thereof." The reversion expectant on the term so created was vested in the defendants, Cumbrae Properties Ltd., and the term was vested in the plaintiff tenants, D. P. Development Co. Ltd. By a letter dated October 15, 1953, the tenants gave notice to the defendant landlords purporting to exercise the option. On November 18, 1953, the landlords' solicitors wrote to the tenants stating that they had advised that the option was void by reason of section 149 (3) of the Law of Property Act, 1925; later, they took the further point that the tenants' exercise of the option was premature.

By this summons, issued on October 1, 1959, the tenants asked (1) that it might be determined whether, on the true construction of section 149 (3) of the Law of Property Act, 1925, or otherwise, the provision for renewal in the lease was valid or void; (2) a declaration that the tenants having given (or alternatively on giving) due notice to the landlords pursuant to the provision were entitled to the grant of such lease on such terms and conditions as in the provision mentioned.

Sir Milner Holland Q.C. and *John Bradburn* for the plaintiff tenants. The question is whether the promises for renewal in the lease are valid. There is no case directly in point. It is relevant to consider not only section 149 (3) of the Law of Property Act, 1925, but also clause 7 of Schedule 15 to the Law of Property Act, 1922. [Reference was made to Wolstenholme and Cherry's Conveyancing Statutes, 12 ed., p. 67, as showing that section 191 of the Act of 1922 should have come into force on January 1, 1925, but was postponed to January 1, 1926, by the Law of Property (Postponement) Act, 1924.] *Northchurch Estates Ltd.* v. *Daniels*[2] is the only case in which there is a decision of any great significance in this field, and even that decision is not directly on this point.

Three points are taken here on behalf of the plaintiffs. First, section 149 (3) clearly deals with (a) a term limited to take effect more than 21 years from the date of the instrument purporting to create it, and (b) a contract to create such a term, i.e., a term so limited. The plaintiffs' right here is to a lease limited to take effect immediately on its execution. Secondly, clause 7 (2) of Schedule 15 to the Law of Property Act, 1922, falls to be considered. It provides: " Any contract entered into after such " commencement " (i.e., of the Act) " for the renewal of a lease " or underlease for a term exceeding 60 years from the termina- " tion of the lease or underlease, and whether or not contained " in the lease or underlease, shall (subject to the express pro- " visions of this Part of this Act) be void." That invalidated contracts for the renewal of a lease for terms exceeding 60 years from the termination of the current lease. Had the legislature intended to invalidate contracts for the renewal of leases where the original lease was for more than 21 years, this was the place in which to put such a provision: and it is not there. It is also of most important significance that this sub-clause deals in terms with " renewal " and section 149 (3) of the Law of Property Act, 1925, does not. The editors of Wolstenholme and Cherry, in their note to the sub-clause, admittedly take the contrary view. Again, it is to be noted that sub-clause (3) of clause 7 of Schedule 15 to the Act of 1922 was repealed and re-enacted in identical terms by section 149 (6) of the Act of 1925. Thirdly, there is no contract until notice has been given. An unexercised option is not a "contract . . . to create . . . a term . . ." within section 149 (3) of the Act of 1925. In support of this contention is prayed in aid section 10 (1) of the Land Charges Act, 1925, which provides: "The following classes of charges on, or obligations affecting land "may be registered as land charges in the register of land charges, "namely: . . . Class C:—A mortgage charge or obligation affecting "land of any of the following kinds, created either before or after "the commencement of this Act, but if created before such "commencement only if acquired under a conveyance made after "such commencement, namely: . . . (iv) any contract by an "estate owner or by a person entitled at the date of the contract "to have a legal estate conveyed to him to convey or create a "legal estate, including a contract conferring either expressly or "by statutory implication a valid option of purchase, a right of "pre-emption or any other like right (in this Act referred to as "'an estate contract')."

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[2] [1947] Ch. 117; 62 T.L.R. 669; [1946] 2 All E.R. 524.

[BUCKLEY J. referred to *Beesly* v. *Hallwood Estates Ltd.*[3]]

Michael Albery Q.C. and *B. T. Buckle* (*W. S. Wigglesworth* with him) for the landlords. Whatever the attractiveness or ingenuity of the plaintiffs' construction of the relevant statutory provisions, it has the drawback that it gives no effective meaning whatsoever to the language which the court has to construe. There was no need to declare void a contract to create an interest already itself declared void.

It is not possible to obtain specific performance of a contract to create an interest which is void in law, or damages for failure to perform such a contract. In construing section 149 (3) of the Act of 1925 it is permissible to ask what the legislature intended and what is the section's true meaning. The construction put forward on behalf of the plaintiffs leads to a somewhat pointless and absurd result. The policy of the Act as a whole is to prevent undue complication of title by the creation of numerous future interests. What the subsection does is to invalidate both future leases and a contract to grant a lease to commence at a date later than 21 years after the date of the contract which might otherwise be registered as an estate contract and so affect the title. "Section 10 (1), Class C (iv), of the Land Charges Act, 1925, and

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[3] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

Northchurch Estates Ltd. v. *Daniels* [4] assist on the meaning of "contract" in section 149 (3) of the Act of 1925, which must in this context include an option. An option of this kind did in fact create an interest in land which was renewable and created also a contract: *London and South Western Railway Co.* v. *Gomm.*[5] Provided that there is something in the section itself which suggests that the prima facie meaning is not the right one the court has considerable latitude. There is nothing to suggest that a ". . . contract . . . for . . . renewal . . ." within sub-clause (2) of clause 7 of Schedule 15 to the Act of 1922 must be for renewal to take effect within 21 years.

As to modification of language to meet the intention, see Maxwell on the Interpretation of Statutes, 10th ed. (1953), p. 229. Here the plaintiffs' construction contradicts the apparent policy of the section and so departure from the strict grammatical construction is permissible.

Everything really turns on the construction to be given to the word "such" in section 149 (3) of the Act of 1925; "such" is not a word of precise accuracy and has frequently been loosely construed. [Reference was made to Jarman on Wills, 8th ed. (1951), p. 696, and to *In re Hutchinson.*[6]] What the draftsman has carried forward is the notion of a term limited to take effect more than 21 years in the future. That is what "such" a term means.

In re Lockwood [7] shows how the apparently prima facie meaning of the language of a statute may be departed from in order to make sense of it—there, the result of giving a strict construction was perhaps more striking than it would be in the present case. Here the court is asked simply to construe the word "such" in a perfectly possible sense. There are two possible constructions of the language, (1) the prima facie, which is out of accord with the policy of the Act and has no effective meaning; (2) the one in which it can be construed to give it effective meaning. The court should approach these provisions with an attempt to carry out the policy that appealed to Parliament.

Sir Milner Holland Q.C. replied.

BUCKLEY J. This case raises a question of construction of some importance and, I think, some difficulty, on section 149 (3) of the Law of Property Act, 1925. I understand that the textbook writers have expressed varying views on the question, though I have not been referred to all that they say on the subject.

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[4] [1947] Ch. 117.

[5] (1882) 20 Ch.D. 562, C.A.

[6] (1886) 54 L.T. 527.

[7] [1958] Ch. 231; [1957] 3 W.L.R. 837; [1957] 3 All E.R. 520.

[His Lordship stated the facts and continued:] The first question which arises for decision is whether, having regard to section 149 (3) of the Act, the option is a valid option at all. [His Lordship read the relevant part of the subsection, and continued:]

It is the contention of the defendant landlords that the provision for renewal contained in the present lease is void under the second branch of the language I have read, which relates to contracts to create such a term.

Sir Milner Holland, who appears for the tenants, putting his argument quite shortly, says that subsection (3) makes it impossible for any man to create a reversionary term—that is to say, a term to take effect more than 21 years from the date of the instrument creating the term—and that it also invalidates any contract by which a man undertakes to create a reversionary term, that is to say, a term which will not commence until 21 years after the date of the instrument creating such a term. He says that the subsection does not invalidate a contract to create a lease, at however remote a date in the future, which, when it is granted, will create a term which will take effect within 21 years of the date of that lease.

He has drawn my attention to Schedule 15 to the Law of Property Act, 1922, clause 7 of which deals in sub-clause (1) with perpetually renewable leases, and in sub-clause (2) with any contract entered into after the commencement of that Act for the renewal of a lease or an underlease for a term exceeding 60 years. He says that if the legislature had intended to legislate to the effect that any contract for the renewal of a lease at a date more remote than 21 years from the date of that contract should be void, the natural place that one would expect to find it would be in connection with the provisions that one finds in clause 7 of the Act of 1922.

In fact, the provisions of section 149 of the Act of 1925 replace what was originally enacted as section 146 of the Law of Property Act, 1922, with the exception of subsection (6) of section 149 of the Act of 1925, which replaces what was previously sub-clause (3) of clause 7 of Schedule 15 to the Act of 1922.

It is well known that although the Law of Property Act, 1922, was enacted in the year 1922, it did not take effect until January 1, 1926, when it came into operation contemporaneously with the Law of Property Act, 1925. In the course of trying to arrange this very complicated real property legislation in the form of a code which would be intelligible to the user, the legislature, in removing some parts of the Act of 1922 into the Act of 1925 and leaving other parts of the Act of 1922 in the Act of 1922, must be regarded as having thought that there was some difference in character between the provisions which were left in the Act of 1922 and the provisions which were transferred into the Act of 1925.

I think, therefore, that there is some force in Sir Milner's suggestion that the fact that renewals of leases are dealt with in terms in the Fifteenth Schedule to the Act of 1922 while the particular provisions with which I am concerned in the present case were uplifted out of the Act of 1922 and put into the Act of 1925 is some indication that the provisions of section 149 (3) of the Act of 1925 were not, primarily at any rate, intended to deal with renewals of leases. Of course, there might be other contracts to create terms in the future besides contracts for renewal in leases already granted. Perhaps one should not place too much reliance on the point, but it is, I think, some slight indication to the court in approaching the construction of section 149 (3).

Mr. Albery, on the other hand, points out that the contention advanced by Sir Milner really gives no operative effect to that part of subsection (3) which deals with contracts at all, because if a lease granting a term to commence at a date later than 21 years from the date of the lease is void, a contract to grant such a lease must also necessarily be void without any express provision to that effect in the statute. He says that that is a strong indication that the construction contended for by Sir Milner is not the right construction and that the court ought to try to find some other meaning to give to the words. The meaning which he invites me to put on them is that the subsection renders void any contract to grant a lease to commence at a date later than 21 years after the date of the contract.

Looking at the words of the section carefully and analytically, the part of the subsection which deals with contracts must, according to its strict grammatical construction, I think, mean that any contract made after the commencement of the Act to create a term at a rent or granted in consideration of a fine, to take effect more than 21 years from the date of the instrument purporting to create that term, shall be void; that is to say, the strict literal construction of the language, in my judgment, leads to the result for which Sir Milner contends. Mr. Albery concedes that that is so, but he says it produces a result which the court should be unwilling to accept, and that, therefore, the court ought to depart from the strict, literal construction of the language and give some other effect to it.

Mr. Albery says that one can discern in the subsection a policy to prevent undue complication of title, either by the creation of estates to take effect in futuro beyond the period of 21 years, or by the creation of a multiplicity of contracts capable of being protected under the Land Charges Act as estate contracts. He says that the second part of the relevant portion of subsection (3) relates to the second part of that policy.

I must confess that when I look at the language of section 149 and the language of clause 7 of Schedule 15 to the Act of 1922, I find it difficult myself to discover what the policy of the legislature was about this. In particular, I find it difficult to understand the policy of sub-clause (2) of clause 7 of the Fifteenth Schedule. The real property legislation of 1925 was an elaborate code which radically altered the law of the land with regard to the tenure of real property and matters relating to that subject, and there are a large number of aspects on which the policy of the legislature can be discerned from the terms of the Act, but in this particular regard I confess that I find myself unable to distil any particular policy out of the relevant provisions. Although it is true, as Mr. Albery says, that if Sir Milner's contention is right, the words "and any contract made after such commencement to create such "a term shall likewise be void" could just as well have been omitted from this section, because they give no added effect to its operation, I do not feel that that is a circumstance which justifies me in departing from what I think is the correct reading of the language.

Mr. Albery has drawn my attention to the passages in Maxwell on Statutes, 10th ed. (1953), at pp. 229 and 252, dealing with modification of language to meet the intention, but I do not feel myself able to find in the language of this particular provision any such contradiction or absurdity as to make it necessary for me to construe the language otherwise than in accordance with its true and natural meaning, nor do I think that giving it that construction produces any inconvenience, hardship or injustice, nor does it result in any sort of repugnance in the terms of the section itself or between the terms of that section and any other provision in the Act.

In these circumstances, I think that the court is bound to construe the section in accordance with its language, more particularly having regard to the fact that it is undoubtedly a section which restricts what would otherwise be the freedom of anyone to contract in this sort of respect in any way he thought desirable.

I ought to refer to a decision of Evershed J. in *Northchurch Estates Ltd.* v. *Daniels*,[1] where a landlord let a farm to a tenant on terms under which the tenant had the option to renew the tenancy from year to year on giving notice on or before December 25 in each year. The question arose as to what the effect of that tenancy was, and the judge held that, on its true construction, the tenancy was a perpetually renewable tenancy. It was contended before him that such an arrangement was a contract to create a succession of reversionary terms, each for one year certain, provided the requisite notice was given each year; and on that basis it was contended that section 149 (3) applied and that, at any rate after 21 years, the option would be invalidated by that subsection.

The judge came to the conclusion that the tenancy, being a perpetually renewable tenancy, was converted by the Law of Property Act, 1922, Sch. 15, cl. 7 (1), into a term of 2,000 years; and in dealing with the argument under section 149 (3), which he stated as follows [2]: " since the contract is made after January 1, " 1926, then at any rate as to all terms starting after " January 14, 1959—that is, 21 years from the date of the " instrument—it is a contract to create a reversionary term or " terms which offends against the provisions of the section," he came to the conclusion that that argument should be rejected, first, on what he called the simple ground that, reading the Act of 1922 and the Act of 1925 together, the case of a perpetually renewable leasehold was dealt with in the Act of 1922 and was not affected by the provisions of section 149 of the Act of 1925, and secondly on the ground that a contract for perpetual renewal ceased to be a contract for perpetual renewal on January 1, 1926, and became a grant of a term of 2,000 years, and on that ground was not within the terms of section 149.

It does appear, rather, from the way in which the judge expressed himself in his judgment, that, had he felt that the facts of that particular case were not such as to take the case out of the Act of 1925 because of the provisions of the Act of 1922 with regard to perpetually renewable leaseholds, he would have or might have held that section 149 (3) did apply to the contract for renewal, at any rate after the period of 21 years from the original tenancy agreement; but there is no report of the argument that was presented to him. I am not in a position to know how this point was dealt with in argument; I do not know whether the judge really applied his mind to the question which I have to decide today or not; and I think that there is nothing in that decision which precludes me from coming to what I should otherwise regard as being the proper conclusion at which to arrive.

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[1] [1947] Ch. 117; 62 T.L.R. 669; [1946] 2 All E.R. 524.

[2] [1947] Ch. 117, 122.

I was referred by Mr. Albery to *In re Lockwood*,[3] a decision of Harman J. (as he then was), in support of his argument that the terms of the subsection were such that I ought to strive to adopt some construction which gave operative effect to the part of the subsection dealing with contracts, but I find the present case very different from that which Harman J. had to decide, for he there came to the conclusion that the literal interpretation of the language in that case would have been so capricious and absurd, and would have produced such an improbable result, that he felt fully justified in striving to arrive at another conclusion, which he succeeded in doing.

In the present case, however, I cannot say that I find anything capricious or absurd in the fact that the draftsman or the legislature has inserted in section 149 (3) some words relating to contracts which may amount to no more than a glimpse of the obvious, and as a statement of a fact which would follow from the preceding provision of the same subsection. This cannot by any means be the only provision in Acts of Parliament which could be omitted without making any substantial or real difference to the effect of the rest of the statute. The subsection is quite consistent throughout, there is no repugnance, no absurdity, no hardship, and the court is bound to give effect to the language of the subsection on its true terms. On those terms the subsection is confined, so far as contracts are concerned, to contracts to create terms which, when created, will only take effect more than 21 years from the dates of the instruments creating them; that is to say, it invalidates contracts for the granting of leases which will, when granted, be reversionary leases, the postponement of the commencement of the term being for more than 21 years from the date of the lease.

Accordingly, I shall answer question 1 of the originating

[3] [1958] Ch. 231; [1957] 3 W.L.R. 837; [1957] 3 All E.R. 520.

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STRAND AND SAVOY PROPERTIES LTD., *In re.*

summons by declaring that, on the true construction of the section, the provision for renewal contained in paragraph 6 of the sixth schedule to the lease is a valid provision.

[The court was not asked to make any declaration on the second question.]

Declaration accordingly.
Defendants to pay plaintiffs' costs as between party and party.

Solicitors: *Pettiver & Pearkes; Swepstone, Walsh & Son.*

K. R. A. H.

C. A.

1960
March 8, 9, 10.

Lord Evershed M.R., Pearce and Harman L.JJ.

INLAND REVENUE COMMISSIONERS *v.* COLLCO DEALINGS LTD.

SAME *v.* LUCBOR DEALINGS LTD.

Revenue—Income tax—Double taxation relief—Residents in Eire—Irish company resident in Eire—Transfer of share capital of English companies to Irish company—Payment to Irish company of dividend on shares of English companies paid wholly out of profits accumulated before transfer—Deduction of British income tax—Whether Irish company entitled to repayment of British income tax—"Dividend "stripping"—Whether Irish company "a person entitled under "any enactment to an exemption from income tax"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 349 (1) (2) (3) (4); *Sch.* 18—*Finance* (*No.* 2) *Act*, 1955 (4 *&* 5 *Eliz.* 2, *c.* 17), *s.* 4 (1) (2).
Statute—Construction—Treaty—Conflict with—Double taxation relief.
Statute — Construction — Extraterritorial effect — Tax Act — Effect on resident of Eire.

On October 31, 1957, a company resident in the United Kingdom sold to an Irish company, incorporated in Eire in 1957 and never resident in the United Kingdom, the whole of the issued share capital in two English companies. Subsequently there were paid to the Irish company interim dividends on the shares in both companies amounting respectively to £174,500 and £104,000, and paid wholly out of profits accumulated before the Irish company acquired the shares. The Irish company claimed exemption from British income tax by virtue of section 349 and paragraph 1 (*a*) of Schedule 18 to the Income Tax Act, 1952.[1] The Crown refused exemption, contending that section 4 (2) of the Finance (No. 2) Act, 1955, applied, and deducted from the respective amount income tax of £74,162 10s. and £44,200. The Irish company appealed to the special commissioners, contending that the words "a person "entitled under any enactment to an exemption from income tax" in section 4 (2) of the Act of 1955 should be limited and controlled so as to exclude residents of Eire who were excluded from the ambit of British income tax by the Treaty of April, 1926, with the Government of Eire:—

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[1] Income Tax Act, 1952, s. 349: "(1) The confirmation, by section 23 "of the Finance Act, 1926, section 21 "of the Finance Act, 1928, and section "37 of the Finance Act, 1948, of the "agreements in force at the passing of "this Act between the United King-"dom and the Republic of Ireland "which are set out in Part I of the "Eighteenth Schedule to this Act is

"not affected by the repeal, by this "Act, of the said sections 23, 21 "and 37. (2) Accordingly the first "of the said agreements, as modi"fied by the second and third of the "said agreements, shall, for any year "of assessment for which, under the "law of the Republic of Ireland, it has "effect with respect to exemption and "relief from Republic of Ireland tax, "have effect with respect to exemption "or relief to be granted from United "Kingdom tax, and the references in "the said agreements to enactments "repealed by this Act shall be taken "for that purpose to be references to "the corresponding provisions of this "Act. . . . (3) For the purpose "of giving effect to the said agree"ments, this Act, in relation to—(*a*) "persons resident in the United King"dom, whether or not also resident "in the Republic of Ireland; and (*b*) "persons entrusted with payment to "persons so resident; and (*c*) claims "by persons resident in the Republic "of Ireland, shall, for any year for "which the said agreements are in "force, have effect subject to the "modifications set out in Part III of "the said Eighteenth Schedule. (4) "The deduction to be given to an "individual under section 220 of this "Act (which relates to the relief "known as the reduced rate relief) "shall not, where relief is given under "section 27 of the Finance Act, 1920, "as set out in Part II of the said "Eighteenth Schedule, be less than "it would have been if the relief had "not been given. (5) The power con"ferred by subsection (7) of section 27 "of the Finance Act, 1920, as set out "in Part II of the said Eighteenth "Schedule, to make regulations shall "be deemed for the purposes of sec"tion 1 of the Statutory Instruments "Act, 1946, to be a power conferred "by an Act passed after the com"mencement of that Act and shall be "exercisable by statutory instrument."

Sch. 18: "Agreements, etc., for "avoidance of double taxation in the "case of the Republic of Ireland. "Part I. Text of Agreements. Agree"ment made April 14, 1926, between "the British Government and the "Government of the Irish Free State "in respect of double income tax. "The British Government and the "Government of the Irish Free State, "being desirous of concluding an "agreement for the reciprocal exemp"tion from income tax and super-tax "of persons who are resident in Great "Britain (including Northern Ireland) "or in the Irish Free State but are "not resident in both countries and "for the reciprocal granting of relief "from double taxation in respect of "income tax (including super-tax) to "persons who are resident in both "countries, and being desirous of "making such supplemental, conse"quential and incidental provisions as "appear necessary or proper for the "purposes of such agreement, have "agreed as follows: 1.—(*a*) Any per"son who proves to the satisfaction "of the Commissioners of Inland "Revenue that for any year he is "resident in the Irish Free State and "is not resident in Great Britain or "Northern Ireland shall be entitled "to exemption from British income "tax for that year in respect of all "property situate and all profits or "gains arising in Great Britain or "Northern Ireland and to exemption "from British super-tax for that "year."

Finance (No. 2) Act, 1955, s. 4: "(1) Where a person engaged in carry"ing on a trade which consists of or

Held, that the claim to exemption made by the Irish company had to be founded on some enabling provision in an English statute, which would necessarily be subject to review by Parliament. The exemption relied on, contained in section 349 of the Income Tax Act, 1952, had been modified by section 4 (2) of the Finance (No. 2) Act, 1955, in unambiguous terms which could not on the true construction be limited so as to leave unaffected the rights of Irish residents. There was no inconsistency between the modification and the continued confirmation in general terms of the Treaty of April 9, 1926.

Decision of Vaisey J. [1959] 1 W.L.R. 995; [1959] 3 All E.R. 351 affirmed.

"comprises dealings in shares or other "investments becomes entitled to "receive a dividend or a holding of "shares of any class to which this section applies, being shares sold or "issued to him or otherwise acquired "by him after October 26, 1955, and "not more than six years before the "date on which the dividend becomes "payable, and the dividend is to any "extent paid out of profits accumulated before the date on which the "shares were so acquired, then, if "those shares, or those shares together "with—(*a*) any other shares the dividend on which is payable to that person and which were sold or issued to "him or otherwise acquired by him "after the said October 26 and not "more than six years before the date "on which the dividend becomes payable, and (*b*) in a case where the "trade is under the same control as "another trade which consists of or "comprises dealings in shares or other "investments, any shares the dividend "on which is payable to the person engaged in carrying on that other trade "and which were sold or issued to "him or otherwise acquired by him "after the said October 26 and not "more than six years before the date "on which the dividend becomes payable, and (*c*) any such shares as are "to be brought into account under "subsection (3) of this section, amount "to ten per cent. or more of the "issued shares of that class, the net "amount of the dividend received on "the shares in the holding shall, to "the said extent to which it was paid "out of profits accumulated before "the shares were acquired, be brought "into account in computing the profits "or gains or losses of the trade as if "it were a trading receipt which had "not borne tax. (2) Where a person "entitled under any enactment to an "exemption from income tax which "extends to dividends on shares becomes entitled to receive a dividend "on a holding of shares of any class "to which this section applies, being "shares sold or issued to him or otherwise acquired by him after the said "October 26 and not more than six "years before the date on which the "dividend becomes payable, and the "dividend is to any extent paid out of "profits accumulated before the date "on which those shares were so acquired, then, if those shares, or those "shares together with—(*a*) any other "shares the dividend on which is payable to that person and which were "sold or issued to him or otherwise "acquired by him after the said October 26 and not more than six years "before the date on which the dividend becomes payable, and (*b*) any "such shares as are to be brought "into account under subsection (3) of "this section, amount to ten per cent. "or more of the issued shares of that "class, the exemption shall, to an "extent proportionate to the said extent to which the dividend is paid "out of profits accumulated before "the date on which the shares were "acquired, not apply to the dividend: "Provided that if any annual payment "is payable by that person out of the "dividend, that annual payment shall "be deemed as to the whole thereof "to be paid out of profits or gains "not brought into charge to tax, and "section 170 of the Income Tax Act, "1952, shall apply accordingly."

APPEAL from Vaisey J.

Collco Dealings Ltd. (hereinafter called the " Irish company ") appealed to the special commissioners from the refusal of the Inland Revenue Commissioners to grant exemption from United Kingdom income tax in respect of certain dividends received from English companies. The Irish company, which was at all times resident in Eire and not in the United Kingdom, claimed to be entitled to exemption from British tax by virtue of section 349 and paragraph 1 (*a*) of Part I of Schedule 18 to the Income Tax Act, 1952. The Inland Revenue Commissioners' refusal of the claim was based on the provisions of section 4 (2) of the Finance (No. 2) Act, 1955, and the question for the special commissioners' decision was whether the Irish company was " a person entitled under any " enactment to an exemption from income tax " within the meaning of that section, or did not come within those words because it was a resident of Eire.

According to the case stated the following facts were agreed:

(a) The Irish company was incorporated in the Republic of Ireland on May 29, 1957, and was at all material times resident in the Republic of Ireland and not in the United Kingdom. (b) On October 31, 1957, 1,000 ordinary shares of £1 each, fully paid, in Carpets and Textiles (Wholesale) Ltd. (being the whole of the issued share capital of that company), were sold by Matrim Finance Ltd. to, and acquired by, the Irish company. (c) On November 1, 1957, an interim dividend of £174 10s. per share, subject to deduction of income tax, was declared by Carpets and Textiles (Wholesale) Ltd., and became payable, as a result of which the Irish company received a gross dividend of £174,500 from which United Kingdom income tax of £74,162 10s. had been deducted. (d) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the Irish company. (e) Carpets and Textiles (Wholesale) Ltd. was a company incorporated on April 1, 1950, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (f) The ordinary shares in Carpets and Textiles (Wholesale) Ltd. acquired as aforesaid were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

(g) Also on October 31, 1957, 2,000 ordinary shares of £1 each, fully paid, in a company then known as Afco Agencies Ltd. and subsequently as A. F. Finance Ltd., and hereinafter called " Afco " (being the whole of the issued share capital of that company) were sold by Matrim Finance Ltd. to, and acquired by, the Irish company. (h) On November 1, 1957, an interim dividend of £52 per share, subject to deduction of income tax, was declared by "Afco" and became payable, as a result of which the Irish company received a gross dividend of £104,000 from which United Kingdom income tax of £44,200 had been deducted. (i) The dividend so declared was wholly paid out of profits accumulated before the date on which the shares were acquired by the Irish company. (j) "Afco" was a company incorporated on March 1, 1951, under the Companies Act, 1948, and was throughout resident in the United Kingdom. (k) The ordinary shares in "Afco," acquired as aforesaid, were shares of a class to which section 4 of the Finance (No. 2) Act, 1955, applied, as defined in subsection (8) (*c*) thereof.

It was also admitted by counsel for the Crown during the hearing that repayments of income tax at the full standard rate had been made by the Crown to Irish residents between 1945 and 1948 on dividends from which income tax had been deducted when payment was made by companies resident in the United Kingdom which had received double taxation relief. Counsel for the Irish company did not contend that it would be liable to pay Irish tax in respect of the dividends in question.

It was contended on behalf of the Irish company that the wide words of section 4 (2) were to be limited and controlled on well-known principles so as to exclude residents of Eire who were by treaty excluded from the ambit of British income tax.

It was contended on behalf of the Inland Revenue Commissioners that section 4 (2) applied to the Irish company, notwithstanding that it was a resident of Eire and that it was not entitled to the exemption claimed.

The special commissioners gave their decision in writing as follows: "1. The question for our decision is whether the words " 'a person entitled under any enactment to an exemption' in " section 4 (2) of the Finance (No. 2) Act, 1955, apply to persons " resident in Eire and not in the United Kingdom to whom " exemption from British tax was granted by the various sections " re-enacted by section 349 of the Income Tax Act, 1952. It is " clear that the general words quoted are wide enough to cover " Eire residents so entitled to exemption, but the very wideness " and generality of the words lets in the argument that they are " to be controlled and limited in their application under certain " well-recognised principles of construction.

"2. We are unable to accept the argument that the general "policy of the income tax legislation compels us to impose the "limitation asked for. We have, however, come to the conclu- "sion that Eire residents have to be excluded from the wide "application of the words of section 4 (2) by reason of two "principles of construction which have found expression in the "decided cases. In the first place it appears to be settled law "that if possible a construction is not to be given to general words "in a statute which would have the effect of imposing the will "of Parliament upon persons not within its jurisdiction: see "*Colquhoun* v. *Heddon*[2]; *Ex parte Blain*[3]; and we consider that "Parliament, by entering into the treaty of April, 1926, with "the Government of Eire, in effect relinquished jurisdiction in "matters of income tax over residents of Eire who are not also "residents of the United Kingdom. That this is so is, we con- "sider, emphasised by paragraph 7 of the treaty. In the second "place, if the inroad contained in section 4 (2) upon the exemp- "tion to tax is effective against residents of Eire, it would in "our opinion be a breach of the treaty which afforded absolute "exemption from British tax to such residents, and it appears to "be a recognised principle of English law that words in an Act "of Parliament are not to be construed in a sense which would "create a breach of a treaty between this country and another "unless such words are so explicit as to allow of no other inter- "pretation. The principal authority for this view appears to be "the case of *Reg.* v. *Wilson*[4]; and, although the actual decision "in that case can be explained on the ground that the Order in "Council itself imposed limitations upon the extradition powers "in accordance with section 2 of the Extradition Act, 1870, "Cockburn C.J., in his judgment, used words which seem to us "to recognise such a principle as axiomatic.

"3. The view we have taken of the proper construction of "section 4 (2) appears to us to receive strong confirmation from "the course of legislation with regard to the liability of Eire "residents prior to the Act of 1955. The Finance (No. 2) Act, "1945, uses words in section 52 which have on their face the "widest application and would in their natural meaning apply to "Eire residents. But when the treaty of July 21, 1947, was "subsequently concluded, by which the two countries mutually "agreed that the limitation upon repayments set out in section 52 "was to be applied to Eire residents, it was thought necessary

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[2] (1890) 25 Q.B.D. 129, 134; 6 T.L.R. 331, C.A.

[3] (1879) 12 Ch.D. 522, C.A.

[4] (1877) 3 Q.B.D. 42.

"to give effect to that treaty so far as English taxation was "concerned by section 37 of the Finance Act, 1948. This seems "to us an indication that section 52 was not considered by the "legislature, despite its wide terms, to apply to Eire residents.

"4. In our opinion, therefore, section 4 (2) of the Finance "(No. 2) Act, 1955, has no application to the [Irish] company "and it is entitled to repayment of tax deducted from the "dividends in question. We accordingly make an order for "repayment of the sum agreed upon between the parties, namely, "£118,362 10s. 0d."

On appeal, Vaisey J. reversed the decision of the commissioners, holding that the Irish company was within section 4 (2) of the Act of 1955 and, accordingly, was not entitled to the exemption claimed. The Irish company appealed.

The issues raised by the appeal in *Inland Revenue Commissioners* v. *Lucbor Dealings Ltd.* were similar.

J. G. Foster Q.C. and *P. Shelbourne* for the Irish company. The words "any enactment" in section 4 (2) of the Finance (No. 2) Act, 1955, have an apparently wide general meaning which would take away the right of an Irish resident to obtain repayment of British income tax at the standard rate (or at the net United Kingdom rate where appropriate). Such a construction involves a breach of the Anglo-Irish treaty, for, although the treaty itself contemplates that it may be brought to an end, specific legislation is necessary. A breach cannot have been intended by Parliament, and there is authority for choosing a narrower construction which avoids an international wrong where, as here, the scope of general words is uncertain and ambiguous: see Maxwell on Interpretation of Statutes, 10th ed. (1953), p. 148; *The Le Louis*[5]; *The Annapolis*[6]; *Reg.* v. *Wilson*[7]; *Colquhoun* v. *Brooks*.[8] In *In re A.B. & Co.*[9] a limit was placed on general words to avoid legislating for foreigners, but the breach in the present case would be more against international comity than the contemplated application of legislation to foreigners.

[HARMAN L.J. referred to *Archer-Shee* v. *Garland*.[10] In *In re A.B. & Co.*[11] it was comparatively easy to limit "any debtor" to a debtor domiciled in England. "Any enactment" might well exclude any foreign enactments but it must cover all English Acts of Parliament. The taxpayer has to invoke the very same enactment in order to claim repayment at all. In *Reg.* v. *Manchester Justices*[12] regard was had to the probable intention of the legislature. It is difficult to contend that Parliament did not intend to stop dividend-stripping if done by Irishmen.]

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[5] (1817) 2 Dods. 210.

[6] (1861) Lush. 295.

[7] L.R. 3 Q.B. 42.

[8] (1889) 14 App.Cas. 493; 5 T.L.R. 728; 2 T.C. 490, H.L.; (1889) 21 Q.B.D. 52, C.A.

[9] [1900] 1 Q.B. 541; 16 T.L.R. 238, C.A.

[10] [1931] A.C. 212; 47 T.L.R. 171, H.L.

[11] [1900] 1 Q.B. 541.

Notwithstanding the apparently wide terms of section 52 of the Finance (No. 2) Act, 1945, which were more general if anything than the words used in section 4 (2) of the Finance (No. 2) Act, 1955, it was not thought that the exemption of Irish residents had been cut down. Although the limitation of repayment was put into force at once so far as British taxpayers were concerned, the Revenue did not rely on the terms of section 52 for Irish residents and the limitation was made expressly applicable to Irish residents by a further treaty in 1947 (which was embodied in section 37 of the Finance Act, 1948). Then, as now, there had been a prima facie inconsistency between section 52 of the Act of 1945 and section 23 of the Finance Act, 1926, which was resolved in favour of the earlier provision. The literal meaning of the words in the statute was not accepted. In 1959 an agreement was made following the alteration in British income tax made by the Finance (No. 2) Act, 1955, but in the present case that agreement does not apply because the shares were acquired before April 8, 1959, and, therefore, article 1 of Schedule 7 does not apply. An Act of Parliament cannot, admittedly, be construed by reference to a later Act, but where, as here, there is ambiguity, the later Act may be used to show the ambit of the earlier statute.

The exemption of Irish residents is a special case, and the treaty is equivalent to a special Act which might well not be within the scope of the words "any enactment." The treaty is only effective after the necessary steps have been taken to give it the force of law, and it only remains effective so long as the Governments concerned continue to give it force. The mere signing of the agreement gave rise to no rights and it is not submitted that the treaty as such is justiciable. The treaty was, however, embodied into English legislation, and the terms are justiciable so that it is easier to see what amounts to a breach. The provision does not have to be rejected altogether, but merely cut down to the extent necessary to avoid a breach of international law. If the exemption by the treaty set out so as to form part of the Income Tax Act, 1952, is cut down by the later Act, there is inconsistency between two English Acts, for section 4 of the Act of 1955 has to be read as one with the Act of 1952 and legislation confirming the treaty is still in force.

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[12] (1855) 5 E. & B. 702.

In *Ostime* v. *Australian Mutual Provident Society* [13] unilateral legislation had to give way to an agreement made before the consolidating Act, although that Act referred to "anything in "any enactment." That was in order to avoid a breach of the agreement with Australia. The words used in that Act were wider than the present words.

Sir Reginald Manningham-Buller Q.C., A.-G., E. Blanshard Stamp and *Alan S. Orr* for the Crown. Income which arises in United Kingdom is subject to taxation irrespective of the residence of the recipient: *Colquhoun* v. *Brooks*,[14] *Whitney* v. *Inland Revenue Commissioners* [15] and *Astor* v. *Perry*.[16] It is now common ground that the treaty made between the Governments of England and Eire granting exemption did not become binding until it had been confirmed, and that, per se, it gave no rights to any individual. It follows that any Irish resident seeking repayment of tax has to claim under section 349 of the Act of 1952, but that is an "enactment" comprehended by section 4 (2) of the Act of 1955.

The practice of the Revenue after the passing of section 52 of the Act of 1945 is not relevant as a guide to the proper construction of the statute, even if (though without so conceding) that practice was recognised as correct by Parliament in passing the later Act. Parliament may have legislated on an incorrect appreciation of the law: *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ltd.*[17]

A conflict between an Act of Parliament and a treaty cannot be resolved in favour of the treaty if the statutory words are plain. There is no canon of construction that in cases of conflict a statute must give way to international law. It is inconceivable that Parliament in 1955 should have been ignorant of the exemption conferred by section 349 of the Act of 1952.

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[13] [1960] A.C. 459; [1959] 3 W.L.R. 410; [1959] 3 All E.R. 245, H.L.

[14] 14 App.Cas. 493.

[15] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88, H.L.

[16] [1935] A.C. 398; 50 T.L.R. 110; 19 T.C. 255, H.L.

[17] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259, H.L.

The formula was clearly intended to include all the categories exempted by the Act of 1952. The Act of 1955 does not constitute a breach of the treaty—if the treaty ceases to be confirmed, in part or wholly, that is not necessarily a breach of the agreement. The agreement itself simply ceases to have effect to the extent that it is not confirmed. The Act of 1955 cuts down the scope of the exemption given by the Act of 1926 (not the treaty), but that is well within the legislative competence of Parliament. Even if the Act of 1955 had constituted a " breach " of the treaty, the court would not be justified in altering the effect of section 4 (2). Parliament is not at all inhibited by the provisions of a treaty: *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [18] and *Theophile* v. *Solicitor-General.*[19] The language of section 4 (2) is plain and unambiguous and does not permit of the interpolation of " other than Irish residents." The Act of 1955 is not inconsistent with section 349 of the Act of 1952; it merely limits its application.

The company have called in aid parliamentary intention, but, if that is relevant, there is no ground for supposing that Parliament would have intended to permit a limited class of persons to continue to carry on dividend-stripping operations. [Reference was made to *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[20]] The argument on the comity of nations is irrelevant. In *Ostime* v. *Australian Mutual Provident Society* [21] the United Kingdom statute preceded the double taxation agreement which provided that the order was to have effect notwithstanding anything in any enactment. Apart from questions of infringement of the comity of nations, the agreement overrode the statute because it was later and specifically provided that it should do so.

The real test is what has Parliament said in the context of the Act, and nothing in the context suggests that " any enactment " means anything less than " any United Kingdom enactment."

E. Blanshard Stamp following. *Ostime* v. *Australian Mutual Provident Society* [21] is not in point, for the sole question there was whether, for the purpose of double taxation, those particular profits came within the agreement at all. The passage in Lord Radcliffe's speech in which he referred to the legislation as unilateral was only a recapitulation of agreed facts, and was not a finding one way or the other.

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[18] [1941] A.C. 308, P.C.

[19] [1950] A.C. 186; 66 T.L.R. (Pt. 1) 441; [1950] 1 All E.R. 405, H.L.

[20] [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49, H.L.

[21] [1960] A.C. 459.

Foster Q.C. in reply. If the Crown's submission is accepted, the paradoxical result would be that, while a double taxation agreement overrules a statute, an agreement solemnly enshrined in an Act of Parliament does not do so. The agreement cannot be partly non-confirmed, as the Attorney-General suggests, for it provides that so long as it has force in Eire it is to have effect in England. Specific words would be needed before it can cease to have effect.

The reason why Lord Radcliffe and Lord Jenkins accepted as obvious in *Ostime* v. *Australian Mutual Provident Society* [21] that the double taxation agreement would not give way to municipal legislation was because Parliament had no jurisdiction to alter such an agreement unilaterally. Those reasons apply with greater force here. *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* [22] is not in point. The issue there was whether the New Zealand legislature had the constitutional power to pass an Act which was inconsistent with the agreement, but it is not in doubt that Parliament can do so.

Although it may be illegitimate to say that a particular construction of an Act must be right because Parliament so treated it in a later Act, yet the later Act may be a relevant aid to construction if the two Acts are required to be read together: *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*.[23] The agreement of 1947 must have been otiose if the right of Irish residents to claim repayment at the full rate had been taken away in 1945.

LORD EVERSHED M.R. stated the facts and continued: Apart from legislation passed in 1955 the Irish company would either certainly or in all probability have been able to recover from the English Revenue not, as we were informed, the actual tax which had been paid in respect of the accumulated profits, but a sum of income tax (which might even have been larger) calculated by grossing up this vast dividend; but the right so to recover such a sum must—and I put this early in my judgment and in the forefront of it—depend upon some statutory right to be found in English legislation.

A series of agreements had been made between representatives of the Governments, on the one side, of the United Kingdom, and on the other side of what was formerly the Irish Free State and later became the Irish Republic. Those agreements were confirmed in both countries by appropriate legislation. So far as this case is concerned, it will only be necessary to pay regard, except in passing, to the English legislation contained in the consolidating Income Tax Act, 1952, and section 349 of that Act in particular, and in section 4 of the Finance Act, 1955, to which I have earlier alluded. But in order to make more clear the history and, I hope, the arguments, it is necessary to have in mind that the first of the agreements which I have mentioned was made in the year 1926 between the representatives of the two Governments I have named. It is now to be found in Schedule 18 of the Income Tax Act, 1952. The effect of it, so far as relevant, was that a person who should prove to the satisfaction of the Inland Revenue Commissioners in England that he was a resident in the Irish Free State and not a resident in Great Britain or Northern Ireland should be entitled to exemption from British income tax for the year in question in respect of properties situated in and profits and gains arising in or from Great Britain and Northern Ireland, and also to exemption from British super-tax for the same year. There was a corresponding arrangement for the benefit of English residents as respects property in the Irish Free State. That was the purpose of the agreement, and it was executed by Ministers on both sides.

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[21] [1960] A.C. 459.

[22] [1941] A.C. 308.

[23] [1956] A.C. 39; [1955] 3 W.L.R. 451; [1955] 3 All E.R. 97; 36 T.C. 126, H.L.

Article 8 provided as follows: "This agreement shall be "subject to confirmation by the British Parliament and by"—the Irish Free State Parliament—"and shall have effect only if and "so long as legislation confirming the agreement is in force in "both countries." That, it is hardly necessary to say, was necessary in order that individual citizens of the two countries should, in fact, enjoy the rights which the agreement intended to confer or provide.

That is the agreement, the intended benefit of which the Irish company in this case asserts. The agreement was later modified twice during the relevant period. The first modification came about in the year 1928 and was rendered desirable or necessary because there was in this country substituted for what was called super-tax a new designation, surtax, so that the provision to which I referred above, if and so far as implemented by appropriate United Kingdom legislation, would be inapposite since it referred to super-tax and not surtax. In the same way in 1947 another agreement was made between representatives of the two countries in order to deal with this sort of case: an English company might not in truth have paid British income tax at the standard rate because, owing to arrangements applicable between this country and other countries also enshrined in English legislation, the English company in question might only have paid a smaller rate, called " net United Kingdom rate "; and the agreement signed in July, 1947, was intended to make applicable to Irish residents comprehended by the original agreement the net United Kingdom rate of tax instead of the standard British income tax rate, where applicable.

I have mentioned these later agreements in order that the history may be understood. But, as I said earlier, the claim here rests upon the effect (as implemented in legislation) of the agreement of 1926, and we are not in this case concerned with the later modifications save to the extent that part of Mr. Foster's forcible argument for the Irish company turned in some measure upon what happened in 1945, 1947 and 1948 in connection with this so-called " net United Kingdom rate," and to that argument I shall presently return.

The agreement of 1926 was, in accordance with the contemplation of article 8, implemented by English legislation shortly afterwards. That legislation was later reproduced in section 349 of the consolidating Act, the Income Tax Act, 1952. [His Lordship read the relevant parts of the section and continued:]

Part III of Schedule 18 is headed: " Provisions for giving " effect to agreements set out in Part I of this Schedule," including, of course, the agreement of 1926, and it is true to say that it is substantially what one would call a series of mechanical provisions to make appropriate for the cases contemplated the relevant parts of the fiscal legislation in England, which is notoriously complex, in particular to make applicable the terms of Schedule D for the purposes of taxation computations, and so forth. We have not examined closely the precise effect of these provisions, and I am not suggesting that they in any real way qualify the prima facie right which would be given to an Irish resident by section 349 (2), standing alone, that is to say, by the statement that the agreement and the rights intended to be enjoyed by Irish residents should have effect in England. I only observe that by the terms of subsection (3) for the purpose of giving effect to the agreements, the Act should for any year have effect subject to certain modifications. It is sufficient to say that in so far as there was any modification of the rights intended to be conferred, it would obviously not go to the root of the matter, but would be a modification based rather on procedural considerations. Still, I mention it for reasons which may later become more apparent.

It is plain enough so far that what the English Parliament did in 1952 was to say that the terms of the agreement of 1926, as stated in Part I of Schedule 18, should be incorporated in the English law as part of the Income Tax Act, 1952, and so should take effect and be effective in English law. It is clear and must not be forgotten (and, indeed, I have already stated it) that if an Irish citizen desires to take advantage of the benefit which the agreement of 1926 intended that he should enjoy, he must be able to invoke for that purpose some provision of the English law, more particularly in this sort of case, some provision of an English statute, and his right in England to enjoy the benefit, to be able to have this exemption (which means to be able to recover income tax) depends upon and depends exclusively upon the section which I have read.

In the course of opening the case Mr. Foster referred a good deal to matters of international law and international comity, and some references were made to cases. Gracefully, Mr. Foster did not cite all the cases which were cited to Vaisey J., but it must be quite clear, first of all, that it is competent to the legislature of the United Kingdom to impose income tax in respect of profits or gains which arise in the jurisdiction, and that competence is in no way qualified because the profits and gains may be enjoyed by someone who is himself not so resident. If, therefore, Parliament decides that tax at a certain rate should be levied in respect of that class of property, or, alternatively, decides that in certain cases persons who might otherwise suffer the tax should be entitled to exemption, it cannot be said that Parliament is trying to exert a jurisdiction over foreigners in the sense that it is trying to legislate outside the proper jurisdiction of the English Parliament. I venture to emphasise that the fact that a person who has a statutory right to an exemption in respect of income tax, a statutory right to recover, may be a foreigner, is of itself quite irrelevant, and does not appear to me to involve any question of comity or international law.

So, as I think, the effect of section 349 is on the face of it to say this, by enacting as part of the municipal law of England the agreement of 1926, that Irish residents may have certain rights to recover tax which is exigible in respect of property in England or profits and gains arising in England. In so far as Parliament chose in 1952 to confer that statutory right, prima facie it must be equally clear that Parliament by some later statutory provision can modify or wholly revoke or repeal it. Putting it quite briefly, what is said here on behalf of the Crown and was the view formed by Vaisey J., is that in the Act of 1955 Parliament in the exercise of its undoubted sovereign power did so qualify the statutory right which section 349 had conferred. [His Lordship read section 4 (2) of the Finance (No. 2) Act, 1955, and continued:] That subsection was intended to strike at this so-called "dividend-stripping" practice. There is no doubt that the shares in Carpet and Textiles (Wholesale) Ltd. were shares of the class covered by the subsection.

Prima facie, therefore, the case would appear simple enough. The Irish company was a person who was entitled under an enactment, namely, section 349 of the Income Tax Act, 1952, to an exemption, which was qualified by section 4 (2) of the Act of 1955. The subsection did not take the exemption away altogether, but it said, as regards dividends in respect of particular classes of shares, that the person specified would not get the full privilege, he would not be entitled to recover the whole amount of the tax but only a certain proportion of it.

The point, as Vaisey J. observed, is, when finally analysed, short, and on the face of it, as I venture to think, simple. But the argument which the Irish company has put forward is, first, to this effect: the Irish company says that one cannot in a case of this kind give to the language which I have read from section 4 of the Act of 1955 its natural effect, because to do so would in some way strike at, would involve a breach of, an agreement between this country and another sovereign state; and that is something which offends against the comity of nations. I do not propose, with all respect to Mr. Foster, to take much time upon that submission. It suffices, as I think, to say two things: first, that what Mr. Foster called "treaties" were these agreements of which the agreement of 1926 is the relevant one, and on the face of that agreement, its effect and continued effect depended, and was expressed to depend, upon confirmation by the legislatures of the two countries, so that the agreement itself contemplated on its face that either side might at some time, if they thought fit, by the exercise of their sovereign legislative power put an end to it. Secondly, as I repeat once more, so far as the Irish company's rights in this case are concerned, they must depend upon some provision giving effect to them in an English statute which necessarily must be subject to review and modification by later legislative enactments.

At this stage I should, perhaps, refer to the way in which the matter was decided by the commissioners in the case stated, their decision being in favour of the Irish company. They said in paragraph 2 of their decision as set out above: "In the first place it "appears to be settled law that if possible a construction is not "to be given to general words in a statute"—and the reference is, of course, to section 4 (2) of the Act of 1955—"which would "have the effect of imposing the will of Parliament upon persons "not within its jurisdiction, . . . and we consider that Parliament, "by entering into the treaty of April, 1926, with the Government "of Eire, in effect relinquished jurisdiction in matters of income "tax over residents of Eire. . . ."

I am quite unable to accept the proposition there stated, and Mr. Foster before us did not at all support it. I have already said with regard to English income tax that there is no question of imposing the will of Parliament on persons not within its jurisdiction; still less can it be said, in my judgment, that the treaty of April, 1926, had the effect that the English Parliament relinquished jurisdiction in matters of income tax over residents of Eire.

The case, however, went on: "In the second place, if the "inroad contained in section 4 (2) upon the exemption of tax is "effective against residents of Eire, it would, in our opinion, be a "breach of the treaty which afforded absolute exemption from "British tax to such residents; and it appears to be a recognised "principle of English law that words in an Act of Parliament are "not to be construed in a sense which would create a breach of a "treaty between this country and another unless such words are "so explicit as to allow of no other interpretation." Then a reference follows to *Reg.* v. *Wilson.*[1]

It is upon that basis, though his expression of the point was not quite the same, that Mr. Foster has founded his argument. But there has seemed to me, I confess, one grave difficulty which the argument has to face, the difficulty which in the end must be, in my judgment, fatal to it. The opening words of section 4 (2) of the Act of 1955 which I have already read are: "Where a "person entitled under any enactment." The difficulty that I have indicated is this: on the face of it, "any enactment" obviously means any Act of the United Kingdom Parliament. If the words are not to have that meaning, then, what is the qualified meaning which is to be given to them? In some cases (and there was an illustration of what I am saying in *Reg.* v.

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[1] (1877) 3 Q.B.D. 42.

Manchester Justices [2]), it was possible in the light of the relevant context to limit the phrase "Acts of Parliament" to mean special Acts of Parliament as distinct from general Acts of Parliament; but no such qualified definition appears here to be possible. It must in the end be said, as I think, by Mr. Foster, that "any "enactment" has to be construed as "any enactment except an "enactment which affects Irish residents." I am not saying that that is necessarily impossible. If the context and the relevant sections require it, that might be the answer. But it is obviously, as I think, a construction involving very grave difficulty. Put the other way round, as it seems to me, the phrase "under any "enactment" prima facie means, and is quite unambiguously referring to, any United Kingdom Act of Parliament, and section 349, part of the Act of 1952, is therefore, on the face of it and, as I think, unambiguously, comprehended in the phrase "any "enactment."

But the case has been put, and I venture to think it is the only way it could be put, in this fashion: it is said that if one looks at subsection (2) of section 349 of the Act of 1952 there is there in clear and express terms confirmation of the agreement of 1926, and a statement by the legislature that it is to have effect so long, at any rate, as it has corresponding effect in the Republic of Ireland. The argument goes on to contend that the terms of section 4 (2) of the Act of 1955 do not boldly and clearly say: "The agreement shall no longer have effect," but they purport to qualify the rights given under the agreement by section 349 while leaving, as it were, the general confirmation contained in section 349 (2) upon the statute book; and so it is said that there is created an inconsistency.

In my judgment, the answer to the point is this: subsection (2) states, no doubt quite clearly, that the agreement of 1926, the terms of which are incorporated in Schedule 18, shall have effect, and Parliament later said, as it was entitled to do, "The effect shall be modified." It is true that the modification might have been taken by those representing the Republic of Ireland to involve a breach and, therefore, a repudiation of the whole agreement, and that would mean an end of it. On the facts as we have seen them, that point was not taken, and it does not seem to me to follow at all that any modification of the statutory rights which section 349 (2) conferred necessarily is inconsistent with the continued confirmation in general terms of the agreement of 1926. But Mr. Foster has also supported this part of his contention by referring to something which I earlier anticipated, namely, the agreement of 1947, and the place it took in the history of this matter between the two countries. It will be recalled that the purpose of the agreement of 1947 was to substitute in appropriate cases for the standard rate of British income tax which the Irish resident could recover, a less figure called "the "net United Kingdom rate." That net rate had been brought into the income tax code, so to speak, in England by the Finance (No. 2) Act, 1945. Section 52 of the Act of 1945, so far as relevant, provided: "Notwithstanding anything in the Income "Tax Acts, no relief or repayment in respect of the tax "deducted"—and so on—"shall be allowed at a rate exceeding," the net United Kingdom rate.

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[2] (1855) 5 E. & B. 702.

Mr. Foster's point was to this effect: In so far as that provision applied to an Irish resident, it qualified the right which he had under section 23 of the Finance Act, 1926, to recover at the full standard British income tax rate, and, therefore, just as section 4 of the Act of 1955 created an inconsistency, as he says, with section 349 of the Act of 1952, so the provisions of section 52 of the Act of 1945 which I have read were inconsistent with section 23 of the Act of 1926, "and if they were given effect to," says Mr. Foster, "they would involve a breach of the agreement, "if not its termination. And observe," says Mr. Foster, "in "those circumstances what was done." It was apparent on the findings in the case and from the later events, such as the agreement of 1947 and the later enactment in England in 1948, that the English Revenue authorities and, as Mr. Foster says, Parliament itself, proceeded on the basis that section 52 of the Act of 1945 did not, in truth, affect or qualify the statutory right given to Irish residents by the Finance Act, 1926.

Mr. Foster invokes that in support of the view that the Act of 1955 should similarly be construed now. Mr. Foster does not go so far as to say that the view taken by Parliament in 1945 and 1948 of the effect or construction of the section of the Act of 1945 is necessarily conclusive as to what the right view of that construction is, but he says it does, after all, lend support to the view that the construction for which he contends is one that has been and can reasonably be accepted.

I think one answer to that argument is this: that the apparent view taken by the English Revenue and, if you like, by the English Parliament when it enacted this Act of 1948 to implement the agreement of 1947, is equally consistent with the view that

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whatever the right construction of section 52 of the Act of 1945 might have been, the Revenue and Parliament, for reasons which they no doubt thought good, did not think it desirable to invoke against the Irish resident the qualifying effect of section 52 of the Act of 1945. They cannot, as I think, put it higher than that. If that is right, then it does not seem to me that the matter with which we are concerned is really further advanced. So, I come back to this, and agreeing once more with Vaisey J.'s statement, the point is indeed short, the question is: having in mind the obvious competence, the acknowledged competence, of the English Parliament to qualify any statutory right to exemption or repayment of English income tax which any person may have, be he a charity, a foreigner, or what you will, can one give, in all the circumstances of this case, to the phrase "in any enactment," a meaning, can one impose upon it some qualification, which will have the result that the section will not apply to the Irish company as being a person otherwise entitled to the specific relief which section 349 of the Act of 1952 conferred upon him?

I have come, like Vaisey J., I must confess, to a clear conclusion that one cannot, and in those circumstances and without, I hope, being disrespectful to the argument by abstaining, as I do, from citation of the other cases which were mentioned to us, I would conclude that this appeal fails and must be dismissed.

PEARCE L.J. I agree with what my Lord has said. The relevant words of section 4 (2) are clear and simple. It is argued that they are so wide and general as to contain a possible ambiguity, or to invite some limitation, but they refer to what the judge described as a very limited and well defined class of the community. In spite of Mr. Foster's forcible argument, I see no warrant for reading into the words "a person" or "any enactment" the respective glosses that have been suggested.

In my view the judge was right in the conclusion at which he arrived and the appeal should be dismissed.

HARMAN L.J. I agree, and with all deference to the eloquent argument presented to us, I thought this a plain enough case. The Irish resident who wishes to obtain exemption from tax arising upon a dividend payable in this country must go to the English Parliament to obtain it. What Parliament has given Parliament may take away, and that it has done to the limited extent which the Act of 1955 proposes in a limited class of cases,

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and in order to stop an abuse. It would be astonishing if that abuse, no longer available to a person resident in England, could still be perpetrated by those resident in the Irish Republic. Of course, if Parliament had chosen to say that should be so, it could do so, but it is very unlikely that it did intend to do so, and, in my view, it has put a stop to it in the plainest terms which apply no less to the stranger than to the citizen of this country.

Appeals dismissed with costs.
Leave to appeal to the House of Lords granted in both cases.

Solicitors: *R. M. Bull & Co.; Solicitor of Inland Revenue.*

E. D.

In re SUTHERLAND, DECD.
WINTER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

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Revenue—Estate duty—Valuation—Shares—" Contingent liabilities "—Control of company by deceased—Company in receipt of capital allowance in respect of assets leaving expenditure unallowed—Sale by company of assets after death of deceased giving rise to balancing charges—Balancing charges resulting in additional assessments to income tax and profits tax—Whether liability to additional assessments at death " contingent liabilities "—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 50 (1), 55 (1) (2) (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch. XI, Pt. I*)—*Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 292 (1), 297.

Revenue—Estate duty—Valuation—Test of price if sold—Whether actual sale to be assumed—Finance Act, 1894, *s.* 7 (5).

The deceased had " control " of a company within the meaning of section 55 of the Finance Act, 1940, during the five years ending with his death on March 29, 1953, so that the shares which he held in the company fell to be valued for estate duty purposes by reference to the net value of the company's assets pursuant to sections 50 and 55 of the Act of 1940. The assets of the company included five ships for which, at the deceased's death, the company had received capital allowances under Part X of the Income Tax Act, 1952, leaving a sum as " expenditure unallowed " as defined by section 297 of the Act of 1952. The ships were sold during the period November, 1953, to February, 1954, for a sum greater than

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the expenditure unallowed, and this gave rise to balancing charges under section 292 of the Act of 1952, resulting in additional income tax and profits tax assessments at the current rates. On a summons to determine whether under section 50 (1) of the Finance Act, 1940,[1] as applied by section 55 (2) (*a*) of that Act, any allowance could be made for the balancing charge that would have been due at the date of death (giving rise to income tax and profits tax) in valuing the shares of the company for estate duty purposes at the deceased's death:—

Held, (1) that neither section 7 (5) [1] of the Finance Act, 1894, nor section 55 of the Finance Act, 1940, required it to be assumed that a sale of the deceased's assets had, in fact, taken place, and that the value of the assets having been ascertained by estimating the price which they would fetch in the open market in accordance with the provisions of subsection (5) of section 7, inquiry had to be made under sections 50 and 55 of the Act of 1940 as to the company's liabilities, but the estimation of contingent liabilities should not proceed on the basis that the assets had in truth been sold (post, pp. 624 et seq., 628 et seq.).

(2) That on the date of the deceased's death the balancing

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[1] Finance Act, 1894, s. 7 (5): "The principal value of any property "shall be estimated to be the price "which, in the opinion of the Com-"missioners, such property would "fetch if sold in the open market at "the time of the death of the "deceased."

Finance Act, 1940, s. 50: "(1) In "determining the value of the estate "for the purpose of estate duty the "provisions of subsection (1) of sec-"tion seven of the Finance Act, 1894, "as to making allowance for debts "and incumbrances shall not have "effect as respects any debt or in-"cumbrance to which assets of the "company passing on the death by "virtue of section forty-six of this "Act were liable, but the Commis-"sioners shall make an allowance "from the principal value of those "assets for all liabilities of the com-"pany (computed, as regards liabili-"ties which have not matured at the "date of the death, by reference to "the value thereof at that date, and, "as regards contingent liabilities, by "reference to such estimation as ap-"pears to the Commissioners to be "reasonable) . . ."

S. 55 (as amended): "(1) Where "for the purposes of estate duty there "pass, on the death of a person dying "after the commencement of this Act, "shares in or debentures of a com-"pany to which this section applies, "then if—(*a*) the deceased had the "control of the company at any time "during the five years ending with "his death; . . . the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of subsection (5) "of section seven of the Finance Act, "1894, shall be estimated by reference "to the net value of the assets of the "company in accordance with the pro-"visions of the next succeeding sub-"section. (2) For the purposes of "such ascertainment as aforesaid—"(*a*) the net value of the assets of "the company shall be taken to be "the principal value thereof estimated "in accordance with the said sub-"section (5), less the like allowance "for liabilities of the company as is "provided by subsection (1) of section "fifty of this Act in relation to the "assets of a company passing on a "death by virtue of section forty-"six of this Act, but subject to the "modification that allowance shall be "made for such a liability as is men-"tioned in paragraph (*b*) of that sub-"section unless it also falls within "paragraph (*a*) thereof . . ."

charge was not a "contingent liability" within section 55 of the Act of 1940 (post, pp. 627–628, 630–631).

Dicta of Lord Greene M.R. in *In re Duffy* [1949] Ch. 28, 33, 37; 64 T.L.R. 545; [1948] 2 All E.R. 756, C.A. applied.

Inland Revenue Commissioners v. *Wood Brothers (Birkenhead) Ltd.* [1959] A.C. 487; [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53; 38 T.C. 275, H.L. considered.

Decision of Danckwerts J., ante, p. 134; [1959] 3 W.L.R. 543; [1959] 2 All E.R. 682 affirmed.

APPEAL from Danckwerts J.[2]

At his death on March 29, 1953, the deceased, Sir Arthur Monro Sutherland, was the owner of 98,700 £1 shares in the capital of B. J. Sutherland & Company Ltd., of which company he had had control during the five years ending with his death. Consequently, for purposes of estate duty, the shares had to be valued by reference to the net value of the assets of the company in accordance with the provisions of sections 50 and 55 of the Finance Act, 1940, instead of by reference to the then open market value of the shares pursuant to section 7 (5) of the Finance Act, 1894.

The assets of the company at the date of the deceased's death included five ships, the value of which at that date had been agreed with the Estate Duty Office to be £1,150,000. The cost of these ships to the company for income tax purposes had been agreed to be £847,907, and at the date of the deceased's death the company had received capital allowances under the provisions of Part X of the Income Tax Act, 1952, leaving "expenditure "unallowed" (as defined by section 297 of the same Act) of £290,749. In the event of a sale of the ships for a sum in excess of the amount of such expenditure unallowed, under section 292 of the Income Tax Act, 1952, a balancing charge would be imposed of an amount equal to such excess, resulting in an assessment to income tax and profits tax at the rate appropriate to the year in respect of which such assessment was made amounting to £270,000.

The ships were in fact sold between November 1953 and February 1954 for sums amounting in the aggregate to £1,070,505. This gave rise to balancing charges of £548,318, resulting in an additional income tax assessment on the company for the year 1953–54 at 9s. in the pound, amounting to £246,743 2s., and an additional profits tax assessment at the rate of 22½ per cent. for the chargeable accounting period ending on March 31, 1954, amounting to £123,371 11s. The aggregate of this additional tax liability was £370,114 13s.

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[2] [1960] Ch. 134; [1959] 3 W.L.R. 543; [1959] 2 All E.R. 682.

The executors of the deceased took out this summons to determine whether, on the true construction of section 50 (1) of the Finance Act, 1940, as applied by section 55 (2) (*a*), any allowance should be made in valuing for estate duty at the deceased's death the shares on the basis of the net value of the assets of the company by taking into account balancing charges (giving rise to income tax and profits tax) attaching to a notional sale at that date by reason of and up to the amount of the capital allowances received by the company.

Danckwerts J. held that such balancing charge was not a "contingent liability" within section 50 (1) of the Finance Act, 1940, and no allowance could be made for it.

The plaintiffs appealed.

The Crown served a cross-notice that they would contend that Danckwerts J.'s decision had to be affirmed on the following grounds, in addition to those on which he founded his judgment, namely, (i) that taxation which has not been imposed by Parliament until after the death of a deceased person is not at the date of his death a "liability" within section 50 (1) of the Act of 1940; (ii) that there was no evidence that at the date of the deceased's death a sale of the company's ships before April 6, 1953, was likely or even possible; (iii) a liability for taxation to which a company can only become subject in the future if it does an act which, at the date of the deceased's death, is within its own volition to do or not to do, is not a liability within section 50 (1).

Sir John Senter Q.C. and *Roderick A. Watson* for the plaintiffs. Balancing charges are "contingent liabilities" within section 50 (1) of the Finance Act, 1950. The plaintiffs' claim does not relate to the balancing charges in fact levied on the actual sale of the ships after the death of the deceased but to the agreed sum, £270,000, the amount of the balancing charges which would have been paid if the ships had been sold at the moment of death. The statute directs that a sale at the moment of death shall be assumed.

The plaintiffs' first proposition is that Danckwerts J. was wrong in regarding himself as bound by the decision in *In re Duffy*.[3] That decision is irrelevant in this case and, further, it is submitted that it was wrongly decided having regard to the later authorities. It is irrelevant because it was concerned with income tax on profits and gains for the purpose of Schedule D and not, as in the present case, with balancing charges. The plaintiffs rely on *Inland Revenue Commissioners* v. *Wood Brothers* (*Birkenhead*) *Ltd.*,[4] which the judge did not regard as relevant. That decision impaired the authority of the *Duffy* case.[5] It cannot be said that the *Wood* case [6] was merely a decision on surtax which had no bearing on income tax, because surtax is a deferred instalment of income tax: Income Tax Act, 1952, s. 229. The income referred to in section 225 (3) is standard rate income tax. Nor can the *Wood* case [6] be said to be merely a decision on the specific provisions relating to surtax or "actual income" because it is an integral part of the ratio decidendi of the majority of their Lordships that the subject-matter of a balancing charge is not income: see *per* Lord Reid [7] and Lord Morton of Henryton.[8] Lord Reid held that the ordinary provisions of Case I of Schedule D (the subject-matter of the *Duffy* case [9]) had nothing to do with balancing charges. Lord Reid [10] rejected the argument that section 1 of the Act of 1952, linked with the annual Finance Act, imposed the charge. That must mean that so far as liability is concerned the decision in *Duffy* [11] has no application to this case.

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[3] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

The plaintiffs' second proposition is that the sole and express statutory hypothesis on which the valuation falls to be made under sections 55 (1) and 50 (1) of the Act of 1940 is a notional sale of the assets at their market price at the time of death, which is "the relevant time" for making allowance for liabilities, including those attaching or crystallising, as a matter of law, on the sale. The liability to a balancing charge was then an existing liability, because at the date of death the ships were worth a sum considerably in excess of their written down value. It was then a contingent liability. *Kirkness* (*Inspector of Taxes*) v. *John Hudson & Co. Ltd.*[12] is direct authority for the proposition that the charging section for income tax and balancing charges giving rise to the liability is section 292 of the Income Tax Act of 1952. The decision of the House of Lords in *Wood* [13] shows that

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[4] [1959] A.C. 487; [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53; 38 T.C. 275.

[5] [1949] Ch. 28.

[6] [1959] A.C. 487.

[7] Ibid. 508, 509.

[8] Ibid. 503, 504.

[9] [1949] Ch. 28.

[10] [1959] A.C. 487, 509–511.

[11] [1949] Ch. 28.

[12] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28.

[13] [1959] A.C. 487.

C. A.

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SUTHERLAND, DECD., *In re.*

a balancing charge is not part of the actual income of a company. The balancing charge should not be mixed up with profits. Section 55 of the Act of 1940 is a variant of section 7 (5) of the Finance Act, 1894. There is only one statutory hypothesis to be applied. It is the value at the date of death. Then the written down value of the ships was grossly below the actual value. At the date of death in the *Duffy* case [14] the charge for income tax was not an existing charge because the annual Finance Act imposing liability had not then been passed.

The plaintiffs' third proposition is that assuming: (i) the allowance at issue is for contingent liabilities under section 50 (1) of the Act of 1940, and (ii) that the liability must be in existence at the relevant time, then, on the facts and on the statutory hypothesis, a liability for balancing charges then existed. That appears from the decision of the House of Lords in *Kirkness (Inspector of Taxes)* v. *John Hudson & Co. Ltd.*[15] and the *Wood* case [16] with regard to income tax, and in *Inland Revenue Commissioners* v. *Butterley & Co. Ltd.*[17] as regards profits tax. It appears from *Wood Brothers* [18] that section 1 of the Income Tax Act, 1952, is not a charging section so far as balancing charges are concerned as opposed to profits charged under Case I of Schedule D in the *Duffy* case.[19] The charge to income tax found in Case I of Schedule D is imposed by each annual Finance Act. The *Duffy* case [19] has no application here. First, because it was in effect overruled by the House of Lords in the *Wood* case [20] and is not binding on the court and, secondly, because it was concerned with income tax under Schedule D, which is an annual tax the charge for which is imposed by each year's Finance Act, and not with a balancing charge, which is a charge under section 292 and is not an annual tax. There is a distinction in principle between income tax and a balancing charge. [Reference was made to *Whitney* v. *Inland Revenue Commissioners* [21] and *W. H. Cockerline & Co.* v. *Inland Revenue Commissioners*.[22]]

As to the profits tax legislation, the charging section imposing liability for profits tax remains section 19 of the Finance Act, 1937. The charge there imposed does not require any further Act to perfect it. Balancing charges in relation to profits tax are dealt with by paragraph 2 of the Eighth Schedule to the Act of 1947. Profits tax is not an annual tax: see the *Butterley case.*[23]

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[14] [1949] Ch. 28.

[15] [1955] A.C. 696.

[16] [1959] A.C. 487.

[17] [1957] A.C. 32; [1956] 2 W.L.R. 1101; [1956] 2 All E.R. 197; 36 T.C. 411.

[18] [1959] A.C. 487.

[19] [1949] Ch. 28.

[20] [1959] A.C. 487.

[21] [1926] A.C. 37.

[22] (1930) 16 T.C. 1; 47 T.L.R. 13.

The plaintiffs' fourth proposition is that tax liability depends on the existence of a charge and not on computation or assessment, which may be made subsequent to the creation of the charge. This appears from the observations of Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners* [24] and also from the *Cockerline* case.[25]

The fifth proposition is that the tax liabilities in issue ought to be allowed in diminution of the estate duty chargeable and not added thereto as a further fiscal charge. Reliance is placed on *Wood* [26] and also on *British Transport Commission* v. *Gourley.*[27]

Roderick A. Watson following. The *Duffy* case [28] can be distinguished by reason of the difference between balancing charges and ordinary Schedule D assessment. Section 292 (2) of the Act of 1952 imposes the balancing charge as a charge assessed at the rate imposed by the next Finance Act. In this case there was a debit, but there might have been a credit, if the sale had been for less than the written down value. The resultant allowance would have been an asset. There is a distinction between an income tax liability as in the *Duffy* case [28] and this balancing charge which was an existing liability at the death.

R. O. Wilberforce Q.C. and *E. Blanshard Stamp* for the Inland Revenue Commissioners. The decision of Danckwerts J. is supported; the *Duffy* case [28] governs this case. The plaintiffs' main point was put somewhat differently below. It is submitted that profits tax and balancing charges are simply income tax and therefore wholly within the principle of the *Duffy* case.[28]

Section 55 of the Act of 1940 directs that two operations shall be carried out. First, the statutory test of value is to ascertain what the property would fetch on a sale, but not on a sale by any particular person. The expenses of a sale cannot be deducted. It has never been disputed that the gross value must be taken without bringing in any liability or deductions which would have to be made at the time of sale. It is not right to contemplate the allowances of a hypothetical sale. Section 7 (5) does not say that the plaintiffs should be put in the same position as they would have been in if the ships had been sold at the death.

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[23] [1957] A.C. 32.

[24] [1926] A.C. 37; 42 T.L.R. 58; 10 T.C. 88.

[25] 16 T.C. 1.

[26] [1959] A.C. 487.

[27] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796.

[28] [1949] Ch. 28.

Section 50 deals with liabilities. These are binding obligations existing at the death to pay something definite. The mere possibility of a liability is not a "contingent liability" within section 50. *Duffy* [29] is conclusive on this point.

The charge which ultimately arises under section 292 of the Income Tax Act, 1952, is a charge to income tax and nothing else, although it is not income tax on trading profits. The tax itself is income tax. The charge under section 292 is assessed to a similar extent to income tax charged under section 1 of the Act of 1952.

As regards the *Duffy* case [29]; the same considerations applied there as here, but as regards two factors this is a stronger case. There the tax could only be avoided by not trading. Here the plaintiffs are only liable if they sell the ships. There is no evidence that any sale was contemplated at the death. There is a distinction between what is morally certain to occur and what may not happen.

The *Wood* case [30] is in favour of the commissioners. The only question at issue there was whether the £18,675 was income. The *Kirkness* case [31] is relied on to show that section 17 of the Income Tax Act, 1945 (the predecessor of section 292), was a charging section. That does not mitigate the principle of *Duffy*.[32] The difference in the *Whitney* case [33] between liability and assessment is accepted, but here there was no present liability at the death. There is no distinction between sections 1 and 292 of the Act of 1952. With regard to *Cockerline*,[34] it is agreed that a liability is created at the date of the sale, but the materials for its assessment are not then available, because the provisions of the relevant Finance Act are not then known. *Gourley's* case [35] was concerned with a different problem. Here no question of prospective earnings arises.

As to profits tax; the commissioners derive some assistance from the *Wood* case.[36] The charge is created by section 19 of the Act of 1937. At the date of death section 19 cannot be applied, nor would it be possible to apply the Eighth Schedule to the Act of 1949. Assessment cannot be made until the relevant legislation is passed. Profits tax is the same as income tax. The *Duffy* case [37] covers profits tax as well as income tax.

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[29] [1949] Ch. 28.
[30] [1959] A.C. 487.
[31] [1955] A.C. 696.
[32] [1949] Ch. 28.
[33] [1926] A.C. 37.
[34] 16 T.C. 1, 19.
[35] [1956] A.C. 185.
[36] [1959] A.C. 487.
[37] [1949] Ch. 28.

To summarise: (1) There is no case for allowing this appeal on the footing of a hypothetical charge, because the terms of section 7 (5) of the Act of 1894 do not admit that. (2) There was at the death no actual liability for the income tax and profits tax, and equally, no contingent liability as interpreted in *Duffy*.[37] There was at the death the possibility of a liability which could become an actual liability (i) if the ships were sold; (ii) if after the date of sale legislation was in force imposing the tax. (3) The only relevant income tax legislation in force was due to expire on April 5, 1953, seven days after the death. If it is proper to consider a sale before that date the possibility should be estimated at nil. (4) If, contrary to the Crown's submission, an allowance must be made on the basis of an assumed sale, the plaintiffs' figures are not necessarily correct. They are based on additional hypotheses and there is not the necessary material to make the estimate. (5) As regards the profits tax; the existence of this charge depends on the charge to income tax.

Sir John Senter Q.C. in reply. Importance is attached to the difference between charge and assessment. This appears from the *Whitney* case.[38] Here there was an existing liability which there was not in the *Duffy* case.[39] This balancing charge should be reckoned as a proper corollary to the statutory hypothesis. There was at the moment when the market value of the ships exceeded the expenditure unallowed a contingent liability for balancing charges, under existing legislation both for income tax and profits tax, and that fell to be taken into account at the agreed figure at the date of death as a contingent liability valued at that date.

LORD EVERSHED M.R. In this case we have all reached a clear conclusion on what I will venture to call the premise to the argument presented by the plaintiffs. We have therefore thought that there would be no advantage in reserving judgment and that possibly, on the other hand, there would be an advantage in stating our view at once, in case the plaintiffs should desire to consider taking the case further.

The facts are set out in the report of the case in the court below.[1] It will be sufficient for me to say this: The problem is one of the liability for estate duty of the estate of Sir Arthur Munro Sutherland. Sir Arthur, at the time of his death, which

[37] [1949] Ch. 28.

[38] [1926] A.C. 37.

[39] [1949] Ch. 28.

[1] [1960] Ch. 134; [1959] 3 W.L.R. 543; [1959] 2 All E.R. 682.

occurred on March 29, 1953, was the owner of 98,700 shares of £1 each in the capital of the ship-owning company B. J. Sutherland & Co. Ltd., and during the five years immediately preceding his death he had such control over that company that, for the purposes of estate duty, the shares in the company which were part of his estate had to be valued in accordance with the provisions of sections 50 and 55 of the Finance Act, 1940. The result, if the judge was (as I think he was) correct in his conclusion, may no doubt be said to work a little hardly on the estate. It is conceivable that in other cases the advantage or hardship might be the other way; but, acknowledging the hardship, it is nevertheless our duty to interpret as best we can the obligations imposed by the statute to which I have alluded.

I turn, therefore, at once to the relevant sections in the Act of 1940 and, as did the judge, it is convenient to read them in the reverse order. Section 55, as amended, provides that where for the purposes of estate duty there pass, on the death of a person dying after the commencement of the Act, shares in a company to which this section applies—and that is the fact here—then if the deceased had the control of the company at the period stated, the principal value of the shares, instead of being estimated in accordance with the provisions of subsection (5) of section 7 of the Finance Act, 1894, " shall be estimated by reference to the " net value of the assets of the company in accordance with the " provisions of the next succeeding subsection." Then subsection (2) continues: " For the purposes of such ascertainment " as aforesaid (a) the net value of the assets of the company shall " be taken to be the principal value thereof estimated in accordance " with the said subsection (5) "—that is subsection (5) of section 7 of the Finance Act, 1894—" less the like allowance for liabilities of " the company as is provided by subsection (1) of section 50 of this " Act in relation to the assets of a company passing on a death," etc.

It is convenient to have in mind what subsection (5) of section 7 of the Finance Act, 1894, says. It is as follows. " The " principal value of any property shall be estimated to be the " price which, in the opinion of the Commissioners, such property " would fetch if sold in the open market at the time of the death " of the deceased."

So far, then, the matter stands thus, if I can correctly summarise it: Having regard to the nature of the deceased's shareholding in this company, for the purposes of estate duty you must value not the shares but the assets of the company—here, in particular, five ships—and you value them by estimating the price which those ships would fetch if sold in the open market on March 29, 1953.

Having done that, subsection (2) of section 55 of the Act of 1940 proceeds, it will be recalled, to go on to provide that you then deduct the allowances intimated in section 50 of the Act of 1940, and it is only necessary to read the latter part of subsection (1) of that section: "the Commissioners shall make "an allowance from the principal value of those assets for all "liabilities of the company (computed, as regards liabilities "which have not matured at the date of the death, by reference "to the value thereof at that date, and, as regards contingent "liabilities, by reference to such estimation as appears to the "Commissioners to be reasonable)."

It is not in dispute that the value of these ships, estimated according to the method prescribed by subsection (5) of section 7 of the Finance Act, 1894, on March 29, 1953, was £1,150,000. It is the fact that the ships were at a later date sold for approximately that figure; but I think Sir John Senter did, in the course of the attractive argument (if he will allow me to say so) he put forward for the plaintiffs, concede that the fact of the sale is for present purposes irrelevant. His argument would be just as good if in truth the ships were still sailing the seas under the flag of the same company, and even if the ships never were sold at all.

The question raised is thus put in the originating summons in the case: "Whether on the true construction of" the sections which I have already read "and in the events which have "happened any and if so what allowance falls to be made in "valuing for estate duty the shares of the company on the basis" therein stated "and in particular whether allowance falls to be "made at such date"—that is March 29, 1953—"by taking into "account balancing charges (giving rise to income tax and profits "tax) attaching to a sale of the ships in question by reason of "and up to the amount of capital allowances previously received "by the company in respect of the said ships."

I shall not go into figures; but it is again not in doubt that by reason of the depreciation allowances for tax purposes which had been made to the company B. J. Sutherland & Co. Ltd. in respect of these ships, they had at the relevant date a written-down value considerably less than the figure of £1,150,000. It therefore follows that, had the ships been sold on March 29, 1953, for that price, there would have arisen (and I can now speak in terms of certainty because all relevant subsequent Finance Acts have, of course, been passed) liability for the company to be charged income tax in respect of a balancing charge, that charge arising from the fact that the sale price was considerably in excess of the written-down value; and similarly there would have arisen an obligation to pay profits tax arising from the same circumstances.

I shall come back presently to deal with an argument put by Sir John in the course of his reply but which I will for present purposes summarise as follows: He said that if you looked as a business man at the affairs of the company as they stood on March 29, 1953, and if you realised that the ships then were worth a sum considerably in excess of their written-down value, then you would have to acknowledge (and as a prudent man you would have to make provision accordingly) that you had received remissions in respect of tax from the Revenue which were greater than you should have received, and that there was therefore an obligation to restore those excessive allowances to the Revenue which would arise if and when the ships were sold at or anything like at the price which I have mentioned. So, said Sir John, looking broadly at it in that way, would it not be right to say that, as things then stood, there was a contingent liability then upon the company to restore those excessive allowances to the Revenue, the contingency being the event (likely enough it may well be) of a sale in due course?

I have stated that I will presently return to that argument because it is, I think, distinct from the argument which Sir John put in the forefront of his case in opening and, of course, in reply. I cannot do better justice to the argument than by referring to the proposition as Sir John was good enough to formulate it to us in writing: "The sole and express statutory hypothesis on which "the valuation falls to be made under section 55 and section 50 "of the Finance Act, 1940, is a notional sale of the assets at "their open market price at the time of the death, making "allowance for liabilities, including, it is submitted, those "attaching, or crystallising, as a matter of law, on the sale." If I do not, therefore, do the proposition an injustice, it is to this effect, that since for the purpose of arriving at the value of the ships at the relevant date you have to assume a sale, therefore you must for all purposes of the application of the two sections proceed upon the basis that this notional sale took place, and took place on March 29, 1953. If that premise is right, then, as it seems to me, there is much to be said for the argument which proceeds from the premise. If you are, so to speak, to treat the ships as having in fact been sold, then can you avoid the inevitable consequence of the sale that you must also take into account, as having then arisen, liability in respect of the balancing charge for income tax and profits tax?

Still accepting the premise, the argument further proceeds to point out that in a case of balancing charge you must look at section 292 of the Income Tax Act, 1952. Subsection (1) of that section is as follows: " Subject to the provisions of this section, " where any of the following events occurs in the case of any " machinery or plant " belonging to a person carrying on a trade and provided or used for the purpose of the trade, " that is to " say "—and then the events include the sale of the machinery or plant—" an allowance or charge (in this Chapter referred to as " ' a balancing allowance ' or ' a balancing charge ') shall, in the " circumstances mentioned in this section, be made to, or, as the " case may be, on, that person for the year of assessment in his " basis period for which that event occurs." So it is said that the effect of section 292 is definitely, on the happening of the relevant event, to create a liability. In that respect Sir John has argued that the case may be distinct from the ordinary case of income tax—say a charge for income tax under Schedule D. In the latter event you must regard the language of section 1 of the Income Tax Act, 1952, which says: " Where any Act enacts that " income tax shall be charged for any year at any rates, then, " subject to the provisions of this Act, the tax at those rates " shall be charged for that year," etc. So Sir John makes this point: If (as was the case of *In re Duffy*,[2] to which I shall make later an allusion) the apprehended liability is a liability for income tax under Schedule D, then it may be that you cannot say that the liability exists, that the charge has arisen, until the passing of the subsequent Finance Act which states for the year of assessment that there shall be income tax for that year at such and such a rate. Per contra, says Sir John, with a balancing charge, the language of section 292 shows that the charge definitely attaches upon the happening of the event and the liability exists, even though its final quantification may await the coming into operation of a subsequent Finance Act; and Sir John reinforces that argument by reference to the well-known language used by Lord Dunedin in *Whitney* v. *Inland Revenue Commissioners*.[3] In the same way Sir John says, quoad the profits tax, that section 19 of the Finance Act, 1937, which introduced the tax under its then title of National Defence Contribution, definitely imposed the charge then and there upon the happening of the event, the arising of the profits of the business, though, again, the quantification might have to await subsequent legislation. "There are," said Lord Dunedin in the passage referred to, "three stages in the imposition of a tax: there is the declaration "of liability, that is the part of the statute which determines "what persons in respect of what property are liable. Next, "there is the assessment. Liability does not depend on assessment." So it is Sir John's argument that, given always the premise, you must treat the liability as having arisen by virtue of the sections mentioned on the happening of the event, the happening being by the premise necessarily supposed to have occurred.

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[2] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756, C.A.

[3] [1926] A.C. 37, 52; 42 T.L.R. 58; 10 T.C. 88, H.L.

I think there is great force in the argument, and I appreciate the distinction which Sir John finds in the particular language of the sections appropriate to the balancing charge and the profits tax. What may have to be considered in regard to it is the effect of the *Duffy* case[4] already mentioned; but I do not, on this aspect of the case, find it necessary to express any view on that matter, because to my mind the premise which the proposition assumes is not in truth well founded. Subsection (5) of section 7 of the Finance Act, 1894, prescribes a method of valuing an asset. It does not require you to assume that the sale, which in estimation you have to take into account, has occurred, and nothing in that subsection or in section 55 (as I think) has the effect that you must, for the purposes here in question, deem the sale to have occurred with whatever the consequences are. The section merely directs that you should arrive at the value of the asset by answering the question: If it was sold today on the open market, what would this asset fetch? In this case the answer is £1,150,000. Having done that, you then turn to the company and you inquire of it what were its liabilities of the nature indicated in section 50 and section 55. I have been unable to answer that second question otherwise than in the light of the facts as they were then affecting the company, and I cannot see, on the language of the sections, that you are entitled, in considering what the contingent liabilities (for example) were, to proceed upon the hypothesis that these ships had in truth been sold.

Mr. Watson, in following Sir John, raised the converse case where the asset, when valued by the method prescribed, turned out to be worth less than its written-down market value, so that the company would be able to say, in respect of that asset, it had not been allowed enough and be able to claim, by virtue of section 292, a balancing allowance. With all respect, it seems quite impossible, on the language of these sections, to say that, for the purpose of valuing the assets of this testator, you would be entitled in such a case to add to the supposed sale value at the relevant date something for the balancing allowance which, if there had been a sale, the shipowner would be entitled to recover. That consideration, I think, adds force to what I regard as the answer to this appeal, namely, that you are merely required by the section to value the ships, and you are not called upon for all the purposes of both sections to assume that the sale in fact had taken place.

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[4] [1949] Ch. 28.

Now, if that is right, it is, I venture to think, the answer to the present appeal. But the question of *In re Duffy* [4] has been raised, and it will be convenient if I now make a reference to that case. It was a case which came before this court in the year 1949. That was not a case of a balancing charge. It was a case in which the deceased owned shares in a company, just as Sir Arthur Sutherland owned shares in B. J. Sutherland & Co. Ltd., of a kind which brought into operation sections 50 and 55 of the Finance Act, 1940; in other words, you were called upon to look at the value of the assets of the company. Having done that, you were then by section 50 required to consider what were the liabilities of the company. In that case, the company, at the death of the testator, had earned a substantial amount of trading profit. The deceased had died in June of 1942; and, according to the ordinary principles of income tax, the liability for such tax upon the company in respect of that year would not arise until April 5, 1943, and would then only arise if you assume (as no doubt would be an obvious assumption) that there was passed by Parliament a Finance Act in 1943 imposing income tax at such and such a rate on trading profits calculated for the preceding trading year. So it was contended that you should, in applying section 50 of the Act of 1940, regard as a contingent liability a company's liability to pay income tax in respect of the profits earned in the then current year, in particular in respect of the period of that year which ended with Mr. Duffy's death. That view was, however, rejected by this court. The judge in the present case, Danckwerts J., made two citations from the judgment of the then Master of the Rolls, Lord Greene, and I follow him in

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[4] [1949] Ch. 28.

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referring to the same passages. Lord Greene M.R. said this[5]: "In the present case each of these companies made profits in the "year in which the deceased died. According to the system that "I have mentioned, a proportionate part of these profits would "fall to be added to the value of the companies' assets as shown "by the previous balance sheets. What is said is this: The "profits earned in the year during which the deceased died will "form the basis of the assessments for income tax in respect of "the next year. Therefore, the profits which are earned during "that year in which the deceased died carry, so to speak, in "gremio a liability for tax in respect of the financial year which "will only begin after the death of the deceased. Roxburgh J. "has held that that argument does not succeed."

The second passage relied upon by the judge was at the end of the Master of the Rolls' judgment, when, after pointing out that no doubt, as a matter of ordinary business sense, it could be regarded as being as near certain as anything could be that there would be liability to pay income tax in respect of these profits, he said[6]: "But, quite apart from all these considerations, taking "the construction of these words, I find it impossible to give "them a meaning extending beyond what is always perfectly "ascertainable without any doubt whatsoever, namely, an "existing legal liability, actually existing in law at the relevant "date. The words cannot be stretched so as to cover something "which in a business sense is morally certain and for which every "business man ought to make provision but which in law does "not become a liability until a subsequent date."

It was said by Sir John that the validity of that decision has been (to say the least) seriously challenged as the result of a later case in the House of Lords, *Inland Revenue Commissioners* v. *Wood Brothers* (*Birkenhead*) *Ltd.*[7] That was a case which related to balancing charge; but the point, as I apprehend the case, was the short one (or, at any rate, one that can be shortly stated), and I take my statement from the speech of Lord Morton of Henryton as follows[8]: "The one question which remains for "decision is whether the sum of £18,675 already mentioned"— and that was the balancing charge figure—"is or is not part of "the 'actual income from all sources' of the respondent

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[5] [1949] Ch. 28, 33.

[6] Ibid. 37.

[7] [1959] A.C. 487; [1959] 2 W.L.R. 47; [1959] 1 All E.R. 53; 38 T.C. 275, H.L.

[8] [1959] A.C. 487, 503.

"company for the relevant period." As appears from the preceding paragraph in the noble Lord's speech, it was agreed, first, that a balancing charge was properly made upon the respondent company under the relevant sections of the Act of 1952; second, that the amount on which the balancing charge was made was correctly computed, under the same provisions of that Act, at the sum of £18,675, the figure I mentioned, and, third, that on the true construction of the Act, once the amount on which the balancing charge is made has been ascertained, the balancing charge is income tax on that amount at the appropriate rate.

That being the nature of the case, the House by a majority came to the conclusion that the figure of £18,675 was not part of the actual income of the company from all sources. The case of *In re Duffy* [9] does not appear ever to have been referred to; and, with all respect to Sir John, I am unable to conclude that anything in the decision in *Wood's* case [10] (and I include, as Sir John did, the argument of Mr. Blanshard Stamp as reported in the Law Reports) ought to be taken by us as disabling the decision in *In re Duffy* [11] as an authority binding upon us.

If I have rightly posed the problem which seems to me to confront in limine Sir John's argument, the answer to this case does not seem to me to depend upon *In re Duffy* [11] at all. This case is, in other words, a stronger case. In *In re Duffy* [11] the profits had in fact arisen. In this case no sale in fact ever took place upon the happening of which event alone a balancing charge would arise. But *In re Duffy* [11] would, I think, if it stands (as I think we in this court must treat it as standing), provide an answer to the alternative way in which Sir John put his case, the way I earlier intimated. In order to make the matter intelligible I will repeat this alternative way of putting the case, namely, that as a matter of business sense, if you looked at the affairs of this company, B. J. Sutherland & Co. Ltd., on March 29, 1953, you would have to say: "It now appears quite clear that "we have been given excessive allowances for wear and tear, "and therefore, if and when these ships are sold"—and, in view of the testator's death, you might say that a sale sooner or later was at least very probable—"we shall have for certain to meet "a balancing charge."

That being so, can it not be said that on the date I have mentioned there was a contingent liability to that extent? I think if that argument is put forward, then the passage which I have read at the end of Lord Greene M.R.'s judgment in *In re Duffy* [11] would provide the answer, if that decision is good law. I have said that, with all respect to Sir John, I am unable to treat *Wood's* case [12] as qualifying or disabling the *Duffy* [13] decision.

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[9] [1949] Ch. 28.
[10] [1959] A.C. 487.
[11] [1949] Ch. 28.

Therefore, I think that on the alternative argument *In re Duffy* [13] provides the answer. But upon the main argument, as I have already indicated, I think the plaintiffs' argument falls down because the requirement of valuation does not seem to introduce a hypothesis which you have got to assume not only in arriving at the valuation but also in discovering what were the company's liabilities.

I said at the beginning of this judgment that it may seem—it may be the fact—that the result is rather hard upon the estate here because the ships have since in fact been sold, a balancing charge has arisen, and therefore it might be said that the Crown in one capacity (namely, as collecting income tax) has recovered a sum in respect of that balancing charge and now comes in another capacity (in its Estate Duty Office capacity) and claims estate duty upon a figure which includes the sum which is payable to the Crown for income tax and profits tax. As was pointed out, the case of *In re Duffy* [13] itself worked hardly, and that particular hardship, I understand, has been relieved by subsequent legislation, section 30 of the Finance Act, 1954. But our duty is to construe these sections as best we can; and, so doing, I have come myself to the clear conclusion that these sections do not permit an allowance by way of contingent liability in respect of the balancing charge, either for income tax or profits tax.

In those circumstances, agreeing with Danckwerts J., I would dismiss the appeal.

WILLMER L.J. I agree with the judgment which my Lord has delivered, and I cannot usefully add anything to it.

UPJOHN L.J. I agree. The main part of the appellants' case is based on the view that under section 7 (5) of the Finance Act, 1894, there is to be a notional sale of the assets. I am quite unable to accept that view. I do not propose to read the section again, for it has already been read. We are all familiar with the fact that in fiscal legislation many artificial conceptions are introduced for the purpose of casting the net of the tax gatherer as wide as possible. This is particularly so in the case of estate duty legislation. Frequently we meet with what are usually referred to as "deeming sections." For example, in some circumstances and for some fiscal purposes, a company may be deemed to be a trustee of its assets for its shareholders—a wholly artificial conception. But I see nothing in section 7 which compels this court to introduce any artificial conception that the assets of the company, in this case certain ships, are to be deemed to be sold or treated as sold at the moment of death. All that that section directs is a valuation, and all that the commissioners have to do is to express an opinion as to what the assets would be likely to fetch if sold in the open market.

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[11] [1949] Ch. 28.

[12] [1959] A.C. 487.

[13] [1949] Ch. 28.

Accordingly, I agree with my Lord that the appellants' case fails in limine. But if it be thought that that be too strict or narrow a view—I do not myself think it is—I still remain of opinion that the plaintiffs' claim must fail in this case. That is a matter which depends on sections 50 and 55 of the Finance Act, 1940. Section 55 (1) provides that in certain circumstances the principal value of some shares shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding subsection. Then that provides for valuation of the assets in accordance with section 7 (5) of the Act of 1894 and for making an allowance for liabilities in accordance with section 50. Subsection (6) provides: "In this "section references to the assets of a company shall be construed "as references to the assets that it had at the death of the "deceased." Therefore, it is perfectly plain that the assets referred to are real assets; and it seems to me a necessary corollary to that that the liabilities that are referred to in the section must be real and not notional liabilities. The whole object is to try to reach a true value of the shares by reference to the value of the assets after deducting liabilities. However contingent they may be, they must be real liabilities; but the whole basis, of course, of the plaintiffs' case is that these liabilities are notional or fictional liabilities which arise upon the notional or fictional sale at the moment of death. Accordingly, for that reason too, it seems to me that the plaintiffs' case fails.

So far, in my judgment at all events, no question of the case of *In re Duffy*,[13] which has been much debated, enters into the

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matter. It is when we come to the second branch of Sir John Senter's argument that that case becomes relevant. That branch is this, that the prudent man at the moment of death would make provision for the balancing charge and the tax charged thereon, for he could see that the ships if sold would attract such a charge. It is said that *In re Duffy* [13] did not bind this court because a balancing charge has been held in the case of *Inland Revenue Commissioners* v. *Wood Brothers* (*Birkenhead*) *Ltd.*[14] not to be income. In my judgment, however, that case does bind us, for, whatever be the nature of the balancing charge, it cannot possibly be disputed that it is subject to income tax, and therefore it seems to me *In re Duffy* [15] covers this case.

It was said then that the authority of *In re Duffy* [15] has been impaired by certain recent cases. The first is *Wood's* case,[16] which I have just mentioned. I agree with my Lord that there is nothing in *Wood's* case [16] that affects in any way the decision in *In re Duffy.*[17] The other case is the well-known case of *British Transport Commission* v. *Gourley*,[18] where, after much conflict of judicial opinion, it was decided that, when estimating a loss of earnings or prospective earnings in the future, you must make some allowance for income tax on those earnings. That is an entirely different subject-matter from the problem which arises in this case, where the duty of the commissioners and of the court is to come to a correct valuation of the assets of a company after allowing for its liabilities at a particular moment of time. Therefore, I see nothing in those cases which affects the authority of *In re Duffy* [19] in this court.

Having said that, I do not want it to be thought that for one moment I think there is any doubt about the correctness of the decision, with which I, at all events, respectfully agree, although its harsh effect has to some extent and in some circumstances been modified by statute. However, I think this case is indeed some way removed from *In re Duffy.*[19] As was pointed out in that case, it was, of course, morally certain that income tax would be charged next year. The only doubt would be whether the Chancellor would turn the screw one more twist or would think it proper in his mercy to relax it. The tax was morally certain. In this case, at the moment of death there does not

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[13] [1949] Ch. 28.

[14] [1959] A.C. 487.

[15] [1949] Ch. 28.

[16] [1959] A.C. 487.

[17] [1949] Ch. 28.

[18] [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796, H.L.

[19] [1949] Ch. 28.

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seem to me any ground for saying that it would be morally certain or even likely that a balancing charge would become exigible. The directors of the company might decide to continue to run these ships for a long time. It might be that they would decide to sell the ships in a time of slump such as is happening at the moment. In that case, far from there being a balancing charge, there might be a balancing allowance. So it seems to me that when you look at section 50 of the Act of 1940 and you see that the contingent liabilities are to be assessed to such estimation as appears to the commissioners to be reasonable, there are no grounds upon which it could be said that it would be right to make some allowance for a balancing charge, possibly arising in future, if the company decided to sell its ships. Therefore, although I agree that *In re Duffy*[19] governs this case, it seems to me this case equally is some way removed from it.

For these reasons, I agree that the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords granted.

Solicitors: *Hyde, Mahon & Pascall for Keenlyside & Forster, Newcastle-upon-Tyne; Solicitor of Inland Revenue.*

B. A. B.

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[19] [1949] Ch. 28.

BANKES *v.* SALISBURY DIOCESAN COUNCIL OF EDUCATION INCORPORATED AND ANOTHER.

[1958 B. No. 428.]

1960
March 24, 25, 28, 29; *April* 13.

Russell J.

Education—School—Endowed school—Closure—Grant of land by lord of manor—Avoidance clause if intention of grantor could not be "carried into effect"—Limitation to steward of manor and rector of the parish "and their successors . . . rectors of the . . . parish with "the lord of the . . . manor" as trustees—Statutory scheme vesting school in Educational Council—Closure of school—Whether avoidance clause continuing condition—Whether possessory title in favour of charity—Whether resulting trust for successor of lord of manor—School Sites Act, 1836 (6 & 7 *Will.* 4, *c.* 70), *ss.* 1, 2, 3 (*repealed and replaced by School Sites Act,* 1841 (4 & 5 *Vict. c.* 38), *ss.* 1, 2)—*Endowed Schools Act,* 1869 (32 & 33 *Vict. c.* 56), *ss.* 9, 46.

Charity—Education—School site—Closure of school—Whether resulting trust for successor of grantor.

1960

BANKES
v.
SALISBURY
DIOCESAN
COUNCIL OF
EDUCATION
INCORPORATED.

Contract—Termination—Gift of land for school—Clause avoiding gift on failure of school—Use of school ceasing 116 *years later—Whether avoidance clause effective.*

Corporation—Sole—Powers—To hold land on trust—Endowed school—Gift to rector on trust.

Statute—Construction—Confiscation—Property rights not to be taken away without compensation unless by clear words.

By an indenture dated September 25, 1840, made pursuant, but without reference, to the School Sites Act, 1836,[1] reciting: "Whereas it is expedient for the benefit of the said parish of "Studland that a school should be established in the parish for "educating the poor children there in the principles of the Christian "religion according to the doctrines and discipline of the United "Church of England and Ireland and in useful knowledge and for "that purpose to erect a convenient school-house . . . ," the lord of the manor of Studland, a tenant for life, granted, by way of free gift, a parcel of land to the steward of the manor and the rector of the parish "and their successors stewards of the manor and "rectors of the said parish of Studland" with the lord of the manor to be held by them to the use of themselves and "their "successors lords and stewards of the said manor and rectors of the "said parish" on trust to permit the land to be used as a site for the erection of the school-house. The deed continued: "in case the said "school-house shall not be erected or being erected it shall be found "impracticable by the said trustees for the time being by reason of "a failure in the contribution or funds for the erection or support "thereof or by any other means whatsoever to carry the intention

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[1] School Sites Act, 1836, Preamble: "Whereas it is expedient to promote "the education of poor children in the "principles of true religion and useful "knowledge, and to afford additional "facilities for the erection of school "rooms to be used for that purpose ". . ."

S. 1: ". . . it shall be lawful for "the lord . . . of any manor . . . to "convey to the incumbent and church-"wardens of any parish in which "a school for the education of poor "children is intended to be erected, "or to the trustees of any such school ". . . so much of the common or "waste grounds in any such parish . . . "as may be required for the site of "such school, . . . and the conveyance "of such part of the common or waste "grounds by the lord . . . of the "manor wherein the same shall be "situate shall be a good and sufficient "conveyance for the purpose of vest-"ing the fee simple and inheritance "thereof in the parties to whom the "same shall be conveyed, for the pur-"pose hereinbefore specified, as fully "and effectually as if every person "having right of common . . . had "joined in and executed such con-"veyance."

S. 2: ". . . it shall be lawful for all "persons being seised in fee simple, "fee tail, or for life . . . to convey "any portion of land of which they "may respectively be seised, includ-"ing copyhold land . . . in the same "manner, to the same persons, and for "the same purpose as hereinbefore "authorised with respect to common "or waste ground."

S. 3: ". . . and all conveyances "made by virtue and according to the "provisions of this Act shall be valid "and effectual in law to all intents "and purposes for vesting the fee "simple and inheritance of the land "conveyed thereby in the parties to "whom the same shall be conveyed for "the purpose hereinbefore specified."

"of the [lord of the manor] into effect then and in such case "the bargain and sale hereby made shall be void." A school was shortly thereafter erected and opened, and was carried on under the name of the Studland Church of England School. Under a scheme framed by the Minister of Education under the Endowed Schools Acts, 1869 to 1874,[2] and approved by Order in Council on December 21, 1949, the legal estate in the school became vested in the first defendant, the Salisbury Diocesan Council of Education Incorporated. Paragraph 2 of the scheme provided: "Re-"peal and Substitution. Every Act of Parliament, letters patent, "statute, deed, instrument or trust affecting the foundation is "hereby repealed and the provisions of this scheme are substituted "therefor." The scheme gave the first defendant power of letting and selling "the premises of the foundation" and to deal with the proceeds in a specified manner. Neither the Act of 1869 nor the scheme provided for compensation on the scheme taking effect. The lord of the manor died in 1855, the rector of the parish in 1857 and the steward of the manor in 1910. On January 9, 1956, the use of the premises as a school ceased.

In an action by the successor in title of the grantor for a declaration that the first defendant held the property on trust for him:—

Held, (1) that, on the true construction of the deed of 1840, the avoidance clause, since it referred to the support of the school, was not limited in time but imposed a continuing condition, and, therefore, operated whenever the property ceased to be used as a school (post, p. 643).

(2) That the School Sites Act, 1836, was an Act to cure defects in the person conveying, and did not dispense with the need for appropriate words of limitation, so that the references to the successors of the lord of the manor and of the steward of the manor had no more effect than an indication of the grantor's wishes; but

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[2] Endowed Schools Act, 1869, s. 4: "In this Act, unless the context other-"wise requires, the term 'endow-"'ment' means every description of "property, real, personal, and mixed, "which is dedicated to such charitable "uses as are referred to in this Act, "in whomsoever such property may "be vested, and in whosesoever name "it may be standing, and whether "such property is in possession or in "reversion, or a thing in action."

S. 9: "The Commissioners . . . by "schemes . . . shall have power, in "such manner as may render any edu-"cational endowment most conducive "to the advancement of the education "of boys and girls, or either of them, "to alter and add to any existing, and "to make new trusts directions and "provisions in lieu of any existing, "trusts, directions and provisions "which affect such endowment, and "the education promoted thereby, in-"cluding the consolidation of two or "more such endowments. . . ."

S. 46: "Upon a scheme coming "into operation, every Act of Par-"liament, letters patent, statute, "deed, instrument, trust, or direction "relating to the subject-matter of "the scheme, and expressed by such "scheme to be repealed and abrogated, "shall, by virtue of the scheme and "of this Act, be repealed and abro-"gated from the date in that behalf "specified, . . . and all property pur-"porting to be transferred by such "scheme shall, without any other con-"veyance or act in the law (so far as "may be), vest in the transferees, and "so far as it cannot be so vested shall "be held in trust for the transferees."

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that the limitation to the rector and his successors was appropriate to confer upon the rector as corporation sole a fee simple interest in one-third as tenant in common as trustee; that there was nothing in the character of a corporation sole which prevented a conveyance in 1840 from taking effect when a trust was imposed, or a court of equity from enforcing that trust; and, it being admitted that, in those circumstances, no possessory title in favour of charity had been acquired in destruction of the interests of the plaintiff, the legal estate, immediately prior to its vesting in the first defendant, was, accordingly, subject to a trust to permit its user for a school until for any reason it ceased to be used as such, and for the plaintiff beneficially under a resulting trust upon such cesser (post, pp. 646, 647, 648, 649, 650).

(3) That, applying the principle of construction that property rights should not be regarded as taken away by statute without compensation unless the language used plainly so provided, the wording of section 9 of the Act of 1869 and of paragraph 2 of the scheme was not apt to repeal or abrogate a trust in favour of a private individual to take effect upon a contingency, only those parts of any deed and those trusts which directly concerned the educational "foundation" as such being repealed or abrogated; that when the school was closed in 1956 it ceased, by virtue of the resulting trust, to be "premises of the foundation," so that the power of letting and sale ceased to exist from that date; and that, therefore, the first defendant held the property upon trust for the plaintiff (post, pp. 651, 653, 655).

Action.

An indenture dated September 25, 1840, expressed to be made between "William John Bankes . . . lord of the manor of Studland . . . of the one part and the said William John Bankes, "Thomas George Robson . . . steward of the said manor of "Studland and the Reverend Charles Michael Turner of Studland, "clerk, rector of the . . . [parish of Studland] of the other "part . . ." was in the following terms: "Whereas it is "expedient for the benefit of the said parish of Studland that a "school should be established in the parish for educating the poor "children there in the principles of the Christian religion according to the doctrines and discipline of the United Church of "England and Ireland and in useful knowledge and for that "purpose to erect a convenient school-house and other necessary "buildings, and whereas the said William John Bankes had "consented to convey the piece of land hereinafter particularly "described for the site of the said school-house and other necessary buildings in manner hereinafter mentioned, now this "indenture witnesseth that in execution and performance of the "said desire and by way of free gift of the said William John "Bankes for the purposes aforesaid he the said William John "Bankes by these presents to be enrolled as required by the "statutes in such case made and provided doth bargain sell and "confirm unto the said Thomas George Robson and Charles "Michael Turner and their successors stewards of the said manor "and rectors of the said parish of Studland with the lord of the "said manor" [the parcel therein described], "and also all the "estate right title interest claim and demand whatsoever both "at law and in equity of him the said William John Bankes into "out of or upon the said piece or parcel thereof with the appurtenances to have and to hold the said piece or parcel of land "hereditaments and premises hereby bargained and sold or "intended so to be with their appurtenances unto the said "Thomas George Robson and Charles Michael Turner to the use "of the said William John Bankes, Thomas George Robson and "Charles Michael Turner and their successors lords and stewards "of the said manor and rectors of the said parish upon trust to "permit the same to be used as a site for the erection thereon "of a school-house for instructing the poor children of the said "parish in useful knowledge and in the principles of the Christian "religion according to the doctrines and discipline of the United "Church of England and Ireland and it is hereby declared and "agreed by and between the said parties hereto that in case the "said school-house shall not be erected or being erected it shall "be found impracticable by the said trustees for the time being "by reason of a failure in the contribution or funds for the "erection or support thereof or by any other means whatsoever to "carry the intention of the said William John Bankes into effect "then and in such case the bargain and sale hereby made shall be "void."

A school was shortly thereafter erected and opened, and was carried on under the name of the Studland Church of England School.

By a scheme framed by the Minister of Education under the Endowed Schools Acts, 1869 to 1874, and not by the commissioners by reason of intermediate legislation, and approved by Order in Council on December 21, 1949, the legal estate in the school became vested in the first defendant, the Salisbury Diocesan Council of Education Incorporated.

The scheme, headed: "Counties—Dorset, Wiltshire and "Devon. Diocese—Salisbury. Foundations—Certain Church of

"England Educational Foundations," was stated to be a "Scheme framed by the Minister of Education under the "Endowed Schools Acts, 1869 to 1874, as applied by an order of "the Minister dated April 7, 1949, made under section 86 (1) of "the Education Act, 1944, as amended by the Education Act, "1946." Paragraph 1, under the cross-heading "Foundations to "which scheme relates" was in the following terms: "This "scheme relates to the Church of England educational foundations specified in the schedule to this scheme, hereinafter "referred to as 'the foundations,' in the diocese of Salisbury, in "the counties of Dorset, Wiltshire and Devon." In the schedule the names of a large number of schools were set out in the left-hand column. In the right-hand column, opposite the names, were descriptions which in most cases consisted of the words "comprised in a deed of . . ." but in some cases described limited interests in land (e.g., leasehold interests or rent charges) or government securities stated to represent the proceeds of sale of land formerly used for the purposes of a school. Opposite the name of the school in question, which appeared as "Studland "Church of England School," were the words "comprised in a "deed of September 25, 1840."

Paragraph 2 of the scheme, headed: "Repeal and substitution," read: "Every Act of Parliament, letters patent, statute, "deed, instrument or trust affecting the foundations is hereby "repealed and the provisions of this scheme are substituted therefor: Provided that until the premises of a foundation regulated "by this scheme are sold or let, as hereinafter provided, that "foundation shall be administered by the governing body hereinafter appointed in accordance with the trust subsisting immediately before the coming into operation of this scheme."

Paragraph 3, headed: "Appointment of governing body," read: "The Salisbury Diocesan Council of Education Incorporated, is "hereby appointed to be the governing body of the foundations, "and all land held in trust for the foundations, except such land as "is at the date of this scheme vested in the Official Trustee of "Charity Lands or is already vested in the governing body, is hereby vested in the governing body, and the former trustees of the "foundations and all other persons capable of being bound by this "scheme shall do all such acts as may be necessary to transfer "to the governing body any stocks, shares, funds and securities "belonging to the foundations which are not at the date of this "scheme invested in the name of the Official Trustees of Charitable Funds."

Paragraph 4, headed: " Sale or letting of premises," read: " The governing body is hereby authorised to sell any of the " premises of the foundations, subject in each case to the " approval of the purchase price by the Minister of Education, or " to let the same according to the general law applicable to the " letting of property by trustees of charitable foundations." Paragraph 5 read: " Application of capital assets and income. " (1) After payment of any expenses of administration the governing body may apply the net rents and profits of any of the " premises of the foundations, or of any part thereof for the time " being unsold, and any other income of the foundations in or " towards the maintenance of any school maintained as a voluntary aided school in the diocese of Salisbury in which religious " instruction is given in accordance with the doctrines of the " Church of England. (2) After payment of any expenses of " administration the governing body may, subject to the further " order of the Minister of Education in each case, apply the net " proceeds of the aforesaid sales and any other capital moneys " of the foundations in or towards the improvement, enlargement " or erection of any such school which is, or is to be maintained " as a voluntary aided school."

William John Bankes, who was the tenant for life of the manor of Studland and property settled with it, died in 1855, Thomas George Robson died in 1857, and the Reverend Charles Michael Turner died in 1910.

On January 9, 1956, the use of the premises as a school ceased.

The plaintiff, Henry John Ralph Bankes, the present lord of the manor of Studland, brought an action against the Salisbury Diocesan Council of Education Incorporated and the Attorney-General, claiming a declaration that the council held the property upon trust for him. The defendants pleaded that (i) on the true construction of the deed the interest of the grantees became indefeasible as soon as the school was erected, (ii) in the absence of proper words of limitation the grantees obtained only life interests by virtue of the deed and since the death of the survivor of them his heirs and assigns had obtained a possessory title to an estate in fee simple, and (iii) in any event the above scheme vested such an estate in the first defendant for the purposes of the scheme to the complete exclusion of the successors in title of William John Bankes.

G. A. Rink Q.C. and *A. Lloyd Stott* for the plaintiff. The property has since January 9, 1956, been held on a resulting trust for the plaintiff.

On the true construction of the deed the trusts were ended when the property ceased to be used as a school and not as soon as the school was built. "Established" in the first recital in the deed means "be and remain," as is shown by the use of "support" and "trustees for the time being." Consequently, the deed created a charitable trust for a limited period, and at the end of the period there was a resulting trust for the grantor. [Reference was made to *In re Blunt's Trusts* [3] and *In re Cooper's Conveyance Trusts.*[4]]

There were two answers to the defence based on the absence of proper words of limitation. (1) The deed operated under the School Sites Act, 1836. (Although it did not expressly refer to the Act of 1836 it complied with all its requirements, and the grantor had no power to grant the land except by virtue of the Act: in both these respects *In re Peel's Release* [5] is distinguishable.) Sections 1 and 2 of the Act provided that a deed made under the Act should convey the fee simple and so made words of limitation unnecessary in such a deed. [Reference was made to Watkins' Principles of Conveyancing, 9th ed. (1840), pp. 355 et seq.] (2) Alternatively, the deed operated at common law as a conveyance of one-third of the property in fee simple to the rector (a corporation sole) and the remaining two-thirds to the lords and stewards of the manor for their lives, and after their deaths the rector acquired a possessory title to these two-thirds. On this footing the two-thirds became an accretion to the trust property and the rector held them on the trusts of the deed including the resulting trust for the lord of the manor, which is for this purpose to be treated as an express trust (*Patrick* v. *Simpson* [6]) so that lapse of time could not be a bar to the rights of the lord: *Soar* v. *Ashwell.*[7] Where trustees acquire a possessory title, they hold on the trusts of their trust deed and cannot hold on any other trusts: *In re Ingleton Charity.*[8] Consequently, possession by the trustees could never have been adverse to the ultimate beneficiary, the lord of the manor: *Moses* v. *Lovegrove.*[9]

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[3] [1904] 2 Ch. 767; 20 T.L.R. 754.

[4] [1956] 1 W.L.R. 1096; [1956] 3 All E.R. 28.

[5] [1921] 2 Ch. 218, 223.

[6] (1889) 24 Q.B.D. 128; 6 T.L.R. 23, D.C.

[7] [1893] 2 Q.B. 390, C.A.

[8] [1956] Ch. 585; [1956] 3 W.L.R. 369; [1956] 2 All E.R. 881.

[9] [1952] 2 Q.B. 533; [1952] 1 T.L.R. 1324; [1952] 1 All E.R. 1279, C.A.

Churcher v. *Martin*[10] is distinguishable since there the trust was completely void. [Reference was also made to *Law Guarantee and Trust Society Ltd. and Hunter* v. *Bank of England.*[11]]

The validity of the scheme under the Endowed Schools Act, 1869, cannot be challenged, but on its true construction the scheme did not take away the ultimate interest under the resulting trust. So far as this school was concerned, the " foundation " referred to in the scheme was not the fee simple in perpetuity but the interest dedicated to the use of the school, i.e., the interest so long as the land was used as a school. The words in the right-hand column of the schedule were intended only to identify the foundation and not to indicate its exact nature.

This construction is supported by two principles: that instruments made under statutory powers should if possible be construed as not exceeding those powers, and a statute or statutory instrument should not be construed as taking away property rights without compensation unless there are compelling words to that effect. The Endowed Schools Act, 1869, gave power to make schemes with regard to " endowments " as defined in section 4, and in this case the " endowment " as so defined ended when the school closed: there is nothing to prevent an " endow- " ment " being for a limited period only: *In re Free Grammar School and Hospital of Archbishop Holgate at Hemsworth and Grammar School at Barnsley.*[12] Further, the Endowed Schools Act, 1869, did not give power to take away property rights without compensation. Section 86 of the Education Act, 1944, which provides for the payment of compensation, had to be passed in order to make possible schemes affecting the fee simple in perpetuity where there was a right of reverter under the School Sites Act, 1841. There is no corresponding enactment in relation to a conveyance made under the School Sites Act, 1836, and in so far as the scheme itself had statutory effect it contained no words suggesting that it was intended to take away rights under the ultimate trust.

N. S. S. Warren Q.C. for the first defendant, the Salisbury Diocesan Council of Education Incorporated. The plaintiff has no beneficial interest in the property, which is held upon exclusively educational and charitable trusts; if a resulting trust could be supported, it is admitted that the plaintiff is entitled thereunder.

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[10] (1889) 42 Ch.D. 312.

[11] (1890) 24 Q.B.D. 406; 6 T.L.R. 205.

[12] (1887) 12 App.Cas. 444, 446; 3 T.L.R. 439, P.C.

The grantor took no financial responsibility for the building of the school, although he may have subscribed, and it is unlikely that subscriptions would be forthcoming on terms that within possibly a short time the grantor would become entitled to the plot and the school. There are many stages before establishment when the resulting trust might operate, not necessarily before the building was completed. There is nothing in the deed to show that the grantor's intention was other than simply that the school should be erected and established: see the definition of "support" in the Oxford English Dictionary. The expression "the said trustees" refers back to the previous expression "the said parties." The words "for the time being" must be read forward with the words "to carry the intention . . . into effect." The deed says nothing about the continuation of the intention of the grantor when once his intention has been carried into effect, nor about "carrying on." The clause is in the form of a condition precedent, not a defeasance.

It is accepted that no adverse possessory title had been acquired by the first defendant if the Act of 1836 dispensed with the need for words of limitation, or if the deed conferred upon the rector as a corporation sole a fee simple interest in one-third as a tenant in common and one-third life interests in each of the other two parties as trustees.

The School Sites Act, 1836, was not intended to touch questions of limitation and to enable conveyances made thereunder to be executed without proper words of limitation. In 1840 conveyances were regarded with greater jealousy than wills in this respect and only a limited break was made by the Conveyancing Act, 1881. [Reference was made to Cheshire's Modern Law of Real Property, 7th ed., p. 112.] The closing words of section 3 of the Act of 1836 refer to section 3 itself and it is not necessary to refer them to sections 1 and 2 and presuppose a conveyance in fee simple. [Reference was made to Sargant J. in *In re Peel's Release.*[13]] If the fee simple had passed under the Act of 1836 without the use of words of limitation, section 15 of the School Sites Act, 1841, would have been unnecessary. The Act of 1841 made trustees a corporation aggregate and it thus became unnecessary to use "successors," but it remained necessary in the case of a corporation sole.

If the School Sites Act, 1836, did not pass the fee simple to the three named trustees, they became joint tenants for life so that on the death of the survivor the deed, including the proviso, became spent, and the person then entitled to the fee simple became entitled to the school. On the death of the survivor in 1910 the school was carried on by managers, and thus until January 9, 1956, there was continuous adverse possession against the person entitled to the fee simple, evidenced by the actions of the managers. [Reference was made to *In re Ingleton Charity.*[14]] A visit to the school by the lord of the manor would not have made the possession less adverse: *Churcher* v. *Martin.*[15]

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[13] [1921] 2 Ch. 218, 224.

There is no authority at common law for saying that a rector as a corporation sole can hold an educational endowment, still less a one-third tenancy in common in such an endowment. [Reference was made to Blackstone's Commentaries, 8th ed., vol. 1, chap. 18, at p. 469, and to Coke on Littleton, vol. 1, p. 9a.]

If there were any resulting trust, it ceased to exist on December 21, 1949, and section 2 of the Endowed Schools Act, 1869, and the scheme replaced it by a charitable trust, thus preventing a private person from becoming entitled. Any resulting trust coming into operation on the school ceasing to exist would be a trust "affecting the foundation" and accordingly be repealed. The power of letting and sale and of dealing with the proceeds overrode the beneficial interest of the plaintiff. The land is the premises of the foundation; the power of sale is not limited by time or circumstances and the proceeds are earmarked by statute for administration expenses and educational charity.

B. J. H. Clauson, for the Attorney-General, adopted the argument for the first defendant.

G. A. Rink Q.C. in reply. Section 15 of the Act of 1841 was passed to remedy a different evil and has no bearing on the present case. There is no reason why a rector cannot be a trustee of an educational charity. [Reference was made to Grant on Corporations (1850), at p. 109, and to Halsbury's Laws of England, 2nd ed., vol. 33, p. 161, and 3rd ed., vol. 9, p. 72.] Coke on Littleton, vol. 1, p. 9a, is only a reference to the problems affecting personalty where there are successive constituents of a corporation sole. It is clear that a corporation sole can take the fee simple at common law, and equity can and will interfere to enforce a trust imposed on a corporation sole and will not allow the corporation to keep the property for itself. [Reference

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[14] [1956] Ch. 585.

[15] 42 Ch.D. 312.

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was made to *In re Thompson's Settlement Trusts* [16] and *Tufnell* v. *Constable.*[17]] The intention of the scheme was to deal with foundations and not with reversionary interests, which are not part of the endowment.

Cur. adv. vult.

April 13. RUSSELL J. read the following judgment: This case raises several points of some difficulty. The point of the action is this: the plaintiff asserts that, by reason of the closing of a school in Studland, Dorset, in 1956, the first defendant—in which the legal estate in fee simple is admittedly vested by reason of a scheme under the Endowed Schools Act, 1869, is trustee of the premises for him. By that defendant (supported by the Attorney-General) it is contended that the plaintiff has no beneficial interest in the property, which is held upon exclusively educational and charitable trusts. The plaintiff's claim is based on a resulting trust under a conveyance by his predecessor in title in 1840, which it is said took effect when the use of the premises as a school ceased in 1956. The defendants admit that if any such claim can be supported the plaintiff is the person entitled.

The first question is whether, on the construction of the deed of 1840, once the school premises were built and the school opened, there could any longer be a possibility of a resulting trust. If not, then the plaintiff must fail. [His Lordship read the deed and continued:]

For the defendants the following points were made: The object of the deed was the establishment of the school. There is no evidence that W. J. Bankes supplied all the moneys to build the school, and some evidence to suggest he did not. It is unlikely, therefore, it is said, that subscriptions for the building would be forthcoming on terms that within possibly a short time the donor of the plot would become entitled to the plot and any building thereon. There were many stages, it is said, before "establishment," when a reverter would sensibly operate: and that makes it unnecessary and unlikely that reverter at some remote future moment was intended. The phrase used was, it is pointed out, not that there should be reverter but that the deed should be void, and, moreover, void if the intention of the grantor could not be "carried into effect"; and it is said that there is nothing to show that his intention was other than simply that the school should be erected, established and launched. It was further argued that the reference to the trustees "for the time "being" does not necessarily involve any indefinite extension in time of the avoidance clause: there might be a change in the trustees before the school was "established."

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[16] [1905] 1 Ch. 229; 21 T.L.R. 86.

[17] (1838) 7 Ad. & E. 798.

Those are arguments of considerable weight but they do not persuade me that the avoidance clause was other than indefinite in time. That the conception of a reverter unlimited in time is in such cases consistent with the collection of money for the building of a school is made plain by the School Sites Act, 1841. The reference to support of the school or school-house cannot be explained unless the reverter or resulting trust is unlimited in time.

In my judgment, on the true construction of the deed of 1840 the avoidance clause is not limited in time and operates whenever the property ceases to be used as a school. I cannot think that the reference to the failure to carry into effect the intention of the grantor for lack of funds for the support of the school-house, or for any other reason, is limited to the provision at the outset of a fund sufficient to keep the building in order or a teaching staff on duty. In my view, it is intended and to be construed as imposing a continuing condition of the suspension of the avoidance (and, therefore, of the reverter by resulting trust) that the property should continue to be used as a school, and the dedication to educational charity is, in my view, so limited.

If, as I have held, the avoidance or reverter clause or resulting trust has no time limit in its operation—which it is not denied is a legal possibility—the next question is related to the possibility that a possessory title for educational charity to the property was acquired so as to extinguish the rights of those entitled under the resulting trust.

Hereunder the first question is: What title was conferred, and on whom, by the deed of 1840? The relevant parts of the deed of 1840 for this purpose are as follows: "Now this indenture "witnesseth that in execution and performance of the said desire "and by way of free gift of the said William John Bankes for "the purposes aforesaid he, the said William John Bankes, by "these presents to be enrolled as required by the statutes in such "case made and provided doth bargain sell and confirm unto "the said Thomas George Robson and Charles Michael Turner "and their successors stewards of the said manor and rectors "of the said parish of Studland with the lord of the said manor" the parcel "to have and to hold the said piece or parcel of land "hereditaments and premises hereby bargained and sold or "intended so to be with their appurtenances unto the said "Thomas George Robson and Charles Michael Turner to the use "of the said William John Bankes Thomas George Robson and "Charles Michael Turner and their successors lords and stewards "of the said manor and rectors of the said parish upon trust."

By the ordinary law it is plain that this language was not sufficient to confer a fee simple in the entirety, lacking, as it did, the appropriate words of limitation. It is accepted by the plaintiff that ordinarily a conveyance in 1840 to individuals A, B and C. upon trusts would in law confer an estate which would not outlast the death of the survivor. To convey the fee simple would require a reference to their heirs as words of limitation. In this connection the plaintiff relies, among other things, upon the provisions of the School Sites Act, 1836, as dispensing with the need for words of limitation.

Before coming to that Act it will be convenient to tabulate certain propositions which were accepted against themselves on behalf of the defendants and the plaintiff in the course of the argument. These admissions have made it unnecessary for me to consider much of the ground which was covered in argument. First, for the defendants it was accepted that W. J. Bankes was in 1840 tenant for life of the property in question by virtue of a settlement dated June 2, 1821; and, further, that the conveyance of 1840 was made by virtue of and pursuant to the School Sites Act, 1836, though not expressly referring to it. Secondly, for the defendants it was accepted that if the Act of 1836 operated to dispense with the need for words of limitation to convey the fee simple no possessory title adverse to the plaintiff would have been acquired. Thirdly, for the defendants it was accepted that if the effect of the conveyance of 1840 was to confer upon the rector as corporation sole a fee simple interest in one-third as a tenant in common as trustee, and no more than life interests on W. J. Bankes and T. G. Robson as trustees, no possessory title would have been acquired in destruction of the interests of the plaintiff under the resulting trust. Fourthly, for the plaintiff, it was accepted that if the effect of the deed of 1840 was to confer no legal interest extending beyond the death of the survivor of the three persons named therein, a possessory title in favour of charity must have been acquired such as to destroy the claim of the plaintiff under the resulting trust.

It is to be observed that the deed of 1840 referred in the habendum to Charles Turner and his successors, rectors of the parish of Studland. These are, in any event, words of limitation appropriate to a corporation sole. As will later appear, I consider (contrary to the defendants' submissions) that there is nothing impossible in law in the conception of a conveyance of land to an ecclesiastical corporation sole upon trust; consequently, the point I have mentioned thirdly as being accepted by the defendants makes it strictly unnecessary for me to consider whether the Act of 1836 dispenses with the need for words of limitation. But I will consider and deal with that question.

I should perhaps have said that, of course, the reference in the deed of 1840 to the successors of the lord of the manor and the steward of the manor cannot be words of limitation, nor can they be more than an indication of the grantor's wishes as to the identity of future trustees.

Before referring to the School Sites Act, 1836, it is pertinent to observe that if it dispenses with the need for a reference to heirs as words of limitation it was a significant breach in the walls of real property tradition, going even further than the Conveyancing Act, 1881, albeit in a limited sphere. So far as I am aware such a breach, if it was made, has not been noticed in the textbooks. It is true that this particular statute did not hesitate to authorise the gratuitous conveyance by bargain and sale; but, nevertheless, I think that clear language must be found if it is also to abandon the requirement of words of limitation.

The leading purpose of the School Sites Act, 1836—and I quote from the preamble—was "to promote the education of poor "children in the principles of true religion and useful knowledge, "and to afford additional facilities for the erection of school rooms "to be used for that purpose."

Section 1 made it lawful for any lord of the manor "to "convey to the incumbent and churchwardens of any parish in "which a school for the education of poor children is intended "to be erected, or to the trustees of any such school" enough common or waste land in the parish to provide a site for such a school. The section further provided that "the conveyance of "such part of the common or waste grounds by the lord . . . "of the manor wherein the same shall be situate shall be a good "and sufficient conveyance for the purpose of vesting the fee "simple and inheritance thereof in the parties to whom the "same shall be conveyed, for the purpose hereinbefore specified, "as fully and effectually as if every person having right of "common . . . had joined in and executed such conveyance."

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The section so enables the lords of the manor, whether they are seized in fee simple, fee tail or for life, whether they are corporations aggregate or sole, and whether feme covert, minor or lunatic (with appropriate consents).

The conveyance of 1840 was not made under this section, but under section 2, which enacted that it should be lawful " for all " persons being seised in fee simple, fee tail, or for life . . . to " convey any portion of land of which they may respectively be " seised, including copyhold land . . . in the same manner, to the " same persons, and for the same purpose as hereinbefore " authorised with respect to common or waste ground." This section also included femes covert, minors and lunatics, and as to copyhold land the lord's consent was required.

Section 3 ends with the following sentence: " and all conveyances made by virtue and according to the provisions of this " Act shall be valid and effectual in law to all intents and " purposes for vesting the fee simple and inheritance of the land " conveyed thereby in the parties to whom the same shall be conveyed for the purpose hereinbefore specified." Section 5 required all conveyances authorised by the Act to be by bargaining and sale enrolled, and provided that they might be so made for valuable consideration or as a free gift. Section 6 limited the area of land to half an acre.

The greater part of section 3 is directed to giving similar powers to ecclesiastical bodies, and it was submitted by the defendants that the final sentence, which I have quoted above, is limited in its operation to that section; but the language is, I think, too general for that submission to be correct. I see no reason why validating words should be attached to conveyances under sections 1 and 3 but not to those under section 2; nor do I see any justification for reading the final sentence of section 3 as though it were worded " made by virtue *of this section* and " according to the provisions of this Act."

It is plain that the purpose of the Act was to enable conveyances in fee simple to be made by persons who, however much they designed to do so, were not in a position to do it. It is obviously an Act to cure defects under the ordinary law in the person conveying, and not defects under the ordinary law in the conveyance. This is additionally reflected in section 4, which dealt with the cases where schools had already been built on land whose owners (in the broad sense) were not able to make a valid and effectual conveyance thereof. The validating words are, in my judgment, sufficiently thus explained without going further. There is no reason why a new and special meaning should be attached to the words " to convey " or " the conveyance " in sections, 1, 2, 3 or 5, namely, that the conveyance, however worded and however lacking in the appropriate words of limitation, should confer a fee simple. The reference to a fee simple in section 2 does not, in my judgment, invalidate that approach to the construction.

In the course of argument on this point reference was made to the School Sites Act, 1841, which replaced and repealed the Act of 1836. It was pointed out that the statutory form of conveyance, albeit permissive, provided for the appropriate words of limitation. Section 15 of the Act of 1841 was also considered. It is not altogether easy to follow, but it does nothing to persuade me that the Act of 1836 must be construed as abolishing the need for the appropriate words of limitation in a conveyance thereunder—certainly not where the conveyance was not to the incumbent and churchwardens.

As previously indicated, the defendants next contended that although in the case of the rector's one-third the words of limitation appropriate to the conveyance of a fee simple to a corporation sole were used in the deed of 1840—that is to say, " and his successors "—yet there was something in the character of such a corporation sole which made it incapable in law of receiving a fee simple interest in land upon trusts such as this, or indeed, otherwise than as part of the endowment of the benefice; and, it was said, more especially if the interest was a tenancy in common.

In support of this submission reference was made to Blackstone's Commentaries, 8th ed. (1778), vol. 1, chap. 18, at p. 469. There it is said: " Before we proceed to treat of the several " incidents of corporations, as regarded by the laws of England, " let us first take a view of the several sorts of them; and then we " shall be better enabled to apprehend their respective qualities.

" The first division of corporations is into aggregate and sole. " Corporations aggregate consist of many persons united together " into one society, and are kept up by a perpetual succession of " members, so as to continue for ever: of which kind are the " mayor and commonalty of a city, the head and fellows of a " college, the dean and chapter of a cathedral church. Corpora-" tions sole consist of one person only and his successors, in " some particular station, who are incorporated by law, in order "to give them some legal capacities and advantages, particularly "that of perpetuity, which in their natural persons they could "not have had. In this sense the king is a sole corporation: "so is a bishop: so are some deans, and prebendaries, distinct "from their several chapters: and so is every parson and vicar. "And the necessity, or at least use, of this institution will be "very apparent, if we consider the case of a parson of a church. "At the original endowment of parish churches, the freehold of "the church, the churchyard, the parsonage house, the glebe, "and the tithes of the parish, were vested in the then parson by "the bounty of the donor, as a temporal recompense to him for "his spiritual care of the inhabitants, and with intent that the "same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The "freehold was vested in the parson; and, if we suppose it vested "in his natural capacity, on his death it might descend to his "heir, and would be liable to his debts and incumbrances; or, at "best, the heir might be compellable, at some trouble and "expense, to convey these rights to the succeeding incumbent. "The law therefore has wisely ordained, that the parson, quatenus "parson, shall never die, any more than the king; by making him "and his successors a corporation. By which means all the "original rights of the parsonage are preserved entire to the "successor: for the present incumbent, and his predecessor who "lived seven centuries ago, are in law one and the same person; "and what was given to the one was given to the other also."

It does not seem to me that this quotation really supports the submission at all. It merely states generally the purposes for which such a corporation is incorporated in the eye of the law. It does nothing to suggest that a conveyance of land to such a corporation sole is in law a nullity if a trust is imposed on the estate or interest conveyed. Still less does it suggest that although the conveyance is not a nullity equity will decline to enforce the trust of the property and will leave the land as mere augmentation of the endowments of the benefice.

For the defendants reference was made also to a passage in Coke on Littleton, vol. 1, p. 9a; but, as was pointed out for the plaintiff, that passage was no more than a reference to the particular problems affecting personalty in relation to successive ownership by the successive constituents of a corporation sole.

I accept the submission for the plaintiff that no authority or principle has been advanced to show that a conveyance of land in

1840 to a corporation sole—whether of this or any other character—cannot take effect in law when a trust is imposed by the grant; nor to show that, although it takes effect in law, equity will not recognise or enforce the trust.

To the contrary, indeed, are general statements. I refer to Halsbury's Laws of England, 3rd ed. (1954), vol. 9, at p. 72, where it is plainly stated: "As a general rule a corporation, "aggregate or sole, may hold property upon trust, either alone "or jointly with one or more individuals"; and to the same effect in the same work, 2nd ed. (1939), vol. 33, at p. 161: "A "corporation, whether aggregate or sole, may be a trustee, but "cannot without a licence in mortmain hold real property in trust "which it could not without such licence hold for its own benefit."

The suggestion that a corporation could, in the eye of equity, retain property which in law was conveyed to it while ignoring a trust thereof was once abruptly dismissed by Lord Hardwicke, as was recorded in *In re Thompson's Settlement Trusts.*[1]

In *Tufnell* v. *Constable* [2] a deceased had covenanted with the vicar and his successors that his estate would cause a certain sum to be invested in Government annuities in the corporate name of the vicar and in the corporate names of the churchwardens and in the corporate name of the Archdeacon of Colchester, to be held and applied by such vicar, churchwardens and archdeacon for the time being upon trusts for the support of parish schools—such as the present one—and for charitable purposes involving relief of poverty in the parish. Among the many points taken by the executors it was argued that corporations sole cannot take personalty in their corporate character or by perpetual succession; but it was never suggested additionally that they could not be trustees at all for such charitable purposes.

Grant, in his work on Corporations (1850), makes the general statement at p. 109 that a corporation, with exceptions in the cases of colleges at universities, may hold lands in trust for anyone, and even for purposes quite private; and at p. 648 he expressly refers to a case of land held by a parson as corporation sole in trust for charitable purposes.

The last lap of this case is therefore to be approached with this in mind, that regardless of where the whole legal estate in the land might from time to time rest, that legal estate was, immediately prior to its vesting in the first defendant by virtue of a scheme in 1949 next to be mentioned, undoubtedly subject to trusts (a) to permit its user for a school until it ceased to be used as such for any reason; and (b) for the plaintiff beneficially under a resulting trust upon such cesser. The final question is whether the scheme of 1949 operated to extinguish that resulting trust and to deprive the plaintiff of the beneficial entitlement to the land and, of course, the buildings thereon, which was otherwise undoubtedly his when in 1956 they ceased to be used as a school.

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[1] [1905] 1 Ch. 229; 21 T.L.R. 86.

[2] (1838) 7 Ad. & E. 798.

The statutory origin of the scheme of 1949 was the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56). That Act followed a commission of inquiry into the education given in schools such as this, which (as the Act recited) recommended various changes in management and education, and in the application of educational endowments, with reorganisation where necessary. By section 9 of that Act commissioners were empowered as follows: They "by "schemes . . . shall have power, in such manner as may render "any educational endowment most conducive to the advancement "of the education of boys and girls, or either of them, to alter, "and add to any existing, and to make new trusts directions and "provisions in lieu of any existing, trusts, directions and provi"sions which affect such endowment, and the education promoted "thereby, including the consolidation of two or more such "endowments. . . ."

By section 4 "endowment" was defined: "In this Act, unless "the context otherwise requires, the term 'endowment' means "every description of property, real, personal, and mixed, which "is dedicated to such charitable uses as are referred to in this Act, "in whomsover such property may be vested, and in whosesoever "name it may be standing, and whether such property is in "possession or in reversion, or a thing in action."

Mr. Rink, for the plaintiff, submitted in the present case the endowment was not the fee simple in the land in perpetuity but only for a period which would determine when it was no longer used as a school; the land could not be regarded as an endowment, and therefore could not be dealt with under the scheme as such, in respect of any subsequent period. There is nothing, he pointed out, in principle to prevent an endowment being for a period less than perpetuity.

Under the Act of 1869 the procedure leading to a scheme was this. A draft scheme was to be prepared, published and circulated; objections could be made, and ultimately it required approval by Her Majesty in Council. It is to be noted that by section 39 any person directly affected by a scheme who felt aggrieved by the scheme on specific grounds might appeal to the Privy Council to reject the scheme; the second of those specific grounds was on the ground "Of the scheme not saving or making "due compensation for his or their vested interest as required "by this Act." This, which is the only reference to vested interest and compensation, obviously refers back to section 13 of the Act which, without reading, I can state certainly did not include a case such as that of the plaintiff.

When considering whether the statute authorised the extinction of the plaintiff's beneficial interest without compensation this seems to me significant. To this must be added the general principle of construction that property rights should not be regarded as taken away by statute without compensation unless the language used plainly so provides. It is, moreover, pertinent to observe that when, under the Education Act, 1944, it was decided to override by these schemes the legal right of reverter under the School Sites Act, 1841—which was a right similar in substance to the plaintiff's in the present case, although, of course, different in law—provision for express overriding normally with compensation was made: see section 86 of the Act of 1944.

Thus far, in my judgment, the statutory power to make schemes did not authorise the overriding or extinction of the resulting trust under the deed of 1840.

However, sections 45 to 47 of the Act of 1869 were in the following terms. Section 45: "A scheme shall not of itself have "any operation, but the same, when and as approved by Her "Majesty in Council, shall from the date specified in the scheme, "or, if no date is specified, from the date of the Order in Council, "have full operation and effect in the same manner as if it had "been enacted in this Act."

Section 46: "Upon a scheme coming into operation, every "Act of Parliament, letters patent, statute, deed, instrument, "trust, or direction relating to the subject-matter of the scheme, "and expressed by such scheme to be repealed and abrogated, "shall, by virtue of the scheme and of this Act, be repealed and "abrogated from the date in that behalf specified, or if no date "is specified, from the date of the scheme coming into operation, "and all property purporting to be transferred by such scheme "shall, without any other conveyance or act in the law (so far as "may be), vest in the transferees, and so far as it cannot be so "vested shall be held in trust for the transferees."

Then section 47: "The Order in Council approving a scheme "shall be conclusive evidence that such scheme was within the "scope of and made in conformity with this Act, and the validity "of such scheme and order shall not be questioned in any legal "proceedings whatever."

It must, therefore, be accepted that the answer to the final question in this case depends upon the true construction of the scheme, although that construction may and must be approached in the light of the general principles to which reference has already been made, and I think also with an unwillingness to find, except from clear language, that the scheme has exceeded the bounds of its statutory authority.

The scheme in question was approved by the King in Council on December 21, 1949, having been framed by the Minister of Education, and not by commissioners, by reason of intermediate legislation to which I need not refer. The scheme is headed: "Counties—Dorset, Wiltshire and Devon. Diocese—Salisbury. "Foundations—Certain Church of England Educational Foundations." It is said to be a "Scheme framed by the Minister of "Education under the Endowed Schools Acts, 1869 to 1874, as "applied by an order of the Minister dated April 7, 1949, made "under section 86 (1) of the Education Act, 1944, as amended by "the Education Act, 1946."

Paragraph 1 is in these terms. It has the cross-heading "Foundations to which scheme relates: (1) This scheme relates "to the Church of England educational foundations specified in "the schedule to this scheme, hereinafter referred to as 'the "'foundations,' in the diocese of Salisbury, in the counties of "Dorset, Wiltshire and Devon." The schedule contains a very great number of schools of this type, and in the left-hand column of the schedule will be found the name of the school or the foundation or charity in question, and in the case of this school it appears on p. 6 as "Studland Church of England School"; then, in the right-hand column, "Comprised in a deed of September 25, "1840." Throughout this schedule one will commonly find that phrase used, "comprised in a deed of" the particular date. In some instances other phrases are used and you find, for example, lands such as Archbishop Wake's charity, "Founded by the "will of William Wake . . . and now represented by the following "sums of stock."

I should add that one of these schools in this list at least, namely, the Milton Abbas Church of England school, was in fact a school which was built upon a site given under the School Sites Act, 1841, and in respect of that school at least a specific order was made under a section of the Education Act, 1944, to which I have made reference, extinguishing the reverter rights under the statute of 1841.

Paragraph 2 of the scheme is headed: " Repeal and substitu- " tion," and starts thus: " Every Act of Parliament, letters " patent, statute, deed, instrument or trust affecting the founda- " tions is hereby repealed and the provisions of this scheme are " substituted therefor." There is a proviso to which I will refer in a moment. This passage in the scheme of course relates back to section 46 of the Act of 1869. It is quite true that in one sense the deed of 1840, which is described in the schedule as " comprising " the foundation, is a " deed or instrument . . . " affecting the foundation," but " affecting " must be construed in some limited sense—a fact which is obvious when one considers the alternative of repealing every Act of Parliament affecting in any way the foundations or any of them. What is the criterion of such limitation? It seems to me that in the light of the whole legislation it must be, in relation to property and property rights, that only those parts of any deed and only those trusts which directly concern the educational foundation as such are repealed or abrogated.

I see no justification for saying that this provision (or the parallel provision in the statute of 1869 itself) is aptly worded to repeal or abrogate a trust in favour of a private individual to take effect upon a contingency or an event; such a trust affects him and not the foundation in the sense in which that word " foundation " is here used.

It was suggested that a resulting trust " affects " the foundation in that it deprives it in the event of endowment. I prefer the view that the only trusts " affecting " the foundation are those which confer upon it an endowment for a period lasting as long as the school continues in operation as a school.

The substance of the matter is that just before the scheme the land was vested in trustees upon two trusts: (a) to permit the school to be carried on thereat for an indefinite period; (b) for the plaintiff absolutely and beneficially when and as soon as the school closed down.

Had the document been expressed in that form it is, in my judgment, reasonably plain that neither section 46 of the Act of 1869 nor paragraph 2 of the scheme would have repealed or abrogated trust (b).

The proviso to paragraph 2 of the scheme is in the following terms: "Provided that until the premises of a foundation regulated by this scheme are sold or let, as hereinafter provided, that foundation shall be administered by the governing body hereinafter appointed in accordance with the trusts subsisting immediately before the coming into operation of this scheme." In the present case this simply means that the first defendant is directed, pending sale or letting of the land, to permit the land to be used for a school.

It is to be noted that by paragraph 2 the provisions of the scheme are to be "substituted" for that which is repealed, and it is not to be expected that the substitute should embrace a wider property interest than that which is repealed.

Paragraph 3, headed "Appointment of governing body," is in these terms: "The Salisbury Diocesan Council of Education Incorporated, is hereby appointed to be the governing body of the foundations, and all land held in trust for the foundations, except such land as is at the date of this scheme vested in the Official Trustee of Charity Lands or is already vested in the governing body, is hereby vested in the governing body; and the former trustees of the foundations and all other persons capable of being bound by this scheme shall do all such acts as may be necessary to transfer to the governing body any stocks, shares, funds and securities belonging to the foundations which are not at the date of this scheme invested in the name of the official trustees of charitable funds."

It is accepted that the land now in question was, in 1949, "land held in trust for" the Studland school foundation, and that the legal estate in fee simple was, by this paragraph, vested in the first defendant. But, it is claimed, this paragraph does nothing to affect the beneficial trusts which remained (a) to permit the land to be used for the school; (b) for the plaintiff absolutely and beneficially when and as soon as it was no longer so used.

Paragraph 4 of the scheme, headed "Sale or letting of premises," is in these terms: "The governing body is hereby authorised to sell any of the premises of the foundations, subject in each case to the approval of the purchase price by the Minister of Education, or to let the same according to the general law applicable to the letting of property by trustees of charitable foundations."

Paragraph 5 (1) deals with the application of the net income of any lettings. The cross-heading is "Application of capital assets

" and income ": " (1) After payment of any expenses of administration the governing body may apply the net rents and profits " of any of the premises of the foundations, or of any part thereof " for the time being unsold, and any other income of the foundations in or towards the maintenance of any school maintained " as a voluntary aided school in the diocese of Salisbury in which " religious instruction is given in accordance with the doctrines of " the Church of England.

" (2) After payment of any expenses of administration the " governing body may, subject to the further order of the Minister " of Education in each case, apply the net proceeds of the aforesaid sales and any other capital moneys of the foundations in or " towards the improvement, enlargement or erection of any such " school which is, or is to be, maintained as a voluntary aided " school."

It is argued for the defendants that this power of letting and sale, coupled with the directions for dealing with the resultant money, necessarily overrides the beneficial interest of the plaintiff. The land, it is said, is the premises of the foundation; the power of sale is not limited by time or circumstances; there is no scope for dealing with the proceeds of sale by paying it to the plaintiff—all is earmarked by statute for administration expenses and educational charity. I do not consider that to be correct. In the present case, as soon as the school closed down in 1956 it ceased, by force of the resulting trust or reverter, to be " premises of the " foundation," those resulting trusts having been those upon which the land, since 1949, had, inter alia, been held by the first defendant. The power of sale under the scheme consequently, in my judgment, no longer existed, nor did the provisions, of course, for the disposal of the proceeds of sale.

The matter is not an easy one, but the statute and scheme, which make no provision for compensation, do not, I consider, in clear terms override and extinguish the resulting trust in favour of the plaintiff.

I ought to add that paragraph 9 of the scheme is in the following terms, under the cross-heading " Questions under scheme." " Any question as to the construction of this scheme, or as to the " regularity or validity of any acts done or about to be done under " this scheme, shall be determined conclusively by the Minister " of Education upon such application made to him for the purpose " as he thinks sufficient."

Inasmuch as any scheme made by the executive with the

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approval of Her Majesty in Council is, by the statute, not open to challenge as ultra vires, and has itself the force of statute, the inclusion of such a paragraph as this might not be universally acclaimed. However, it is common ground among the parties that since the Minister has not made, and has not been asked to make, any determination in this matter, the jurisdiction of the court to determine the rights of the plaintiff is not ousted.

I therefore conclude that the plaintiff has successfully surmounted the various hurdles set in his path, and will declare that since the closure of the school on January 9, 1956, the first defendant has held the land the subject of the grant of 1840 in trust for the plaintiff absolutely and beneficially.

Declaration accordingly.
Attorney-General to pay three-fourths of the plaintiff's costs; no order as to the first defendant's costs.

Solicitors: *Gregory, Rowcliffe & Co.; Darley, Cumberland & Co. for Jonas & Parker, Salisbury; Treasury Solicitor.*

M. G. T.

END OF VOLUME AND OF CHANCERY SERIES FOR 1960.

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